[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 731

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, PETITIONER,

vs.

MARK E. NEBEKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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[fol. 1] [Caption omitted]

[fol. 2] **IN THE SUPREME COURT OF INDIANA**

No. 29004

STATE OF INDIANA,
County of Marion, ss:

INDIANA DEPT. OF STATE REVENUE, GROSS INCOME TAX DIVISION, Appellant,

vs.

MARK E. NEBEKER, Appellee

APPELLANT'S ASSIGNMENT OF ERRORS—Filed January 5, 1953

The Appellant, Indiana Department of State Revenue, Gross Income Tax Division, says and shows to the court that there is manifest error in the decision, judgment and proceedings of the trial court, prejudicial to Appellant in this:

1. The Court erred in overruling the Appellant's Motion for a New trial.

The motion for a new trial, the overruling of which is the error relied upon for reversal in this case specified the following grounds:

1. The decision of the court is not sustained by sufficient evidence.
2. The decision of the court is contrary to law.

Wherefore, the Appellant prays that the decision and judgment rendered herein be reversed, and that the Appellant be granted a new trial and for such other relief to which the Appellant may be entitled.

Respectfully submitted (S.) J. Emmett McMana-[fol. 3] mon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Appellant.

(File endorsement omitted.)

IN THE VERMILLION CIRCUIT COURT, JANUARY TERM, 1951

No. 19115

[fol. 4] MARK E. NEBEKER

vs.

DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION

ENTRY OF FILING OF PETITION FOR TRANSFER—Filed December 8, 1952

Comes now Mark E. Nebeker, petitioner in the above entitled cause and files and presents his verified petition praying that his certain cause of action heretofore pending before the Administrative Adjudication Section of the Indiana Department of State Revenue, Gross Income Tax Division, bearing cause No. 37 of said Agency, be transferred to the Circuit Court of Vermillion County, Indiana, under the terms and provisions of Chapter 305 of the Acts of 1951 of the General Assembly of the State of Indiana.

(File endorsement omitted.)

[fol. 5] IN THE VERMILLION CIRCUIT COURT

RULING OF THE COURT ON PETITION TO TRANSFER

And now the Court being fully advised in the premises orders that said cause of action be transferred to the Vermillion Circuit Court and that a summons issue upon plaintiff's complaint therein to said defendant. Clerk is ordered to issue summons returnable April 30, 1951, directed to the Sheriff of Marion County, Indiana.

[fol. 6] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ENTRY OF FILING OF TRANSCRIPT OF RECORD

Comes now defendant and files transcript for transfer of cause of action, which said transcript is in the following words and figures, to-wit:

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

[fol. 7] DEFENDANT'S COMPLIANCE WITH COURT ORDER FOR TRANSFER OF CAUSE OF ACTION—Filed December 8, 1952

Comes now the defendant and shows to this Honorable Court that the plaintiff heretofore filed in this Court its certain Petition for Transfer of Cause of Action from the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and that the issues and causes heretofore formed, or in process of being formed, be transferred to this Court pursuant to the terms and provisions of Chapter 305 (Senate Bill 201) of the Acts of the General Assembly of Indiana, (87th Session, Effective Date March 7, 1951).

An order having been heretofore made or entered by this court as to the transfer of said cause, the defendant does now tender to the Court for filing in this cause, a transcript of all of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and respectfully requests that the same be ordered filed by the Clerk of this Court and made a part of the record in this cause of action; that said cause is now transferred for such further proceedings as the Court may direct.

Respectfully submitted, J. Emmett McManamon, Attorney General, John J. McShane, Deputy Attorney General, Lloyd C. Hutchinson, Deputy Attorney General, Joseph E. Nowak, Deputy Attorney General.

(File endorsement omitted.)

[fol. 8] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ORDER TO FILE TRANSCRIPT OF THE RECORD, ETC.

The plaintiff in the above entitled cause of action having heretofore filed a certain Petition for Transfer of Cause [fol. 9] of Action from the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section, and an interlocutory order having been issued upon said petition, and the defendant having heretofore filed Defendant's Compliance with Plaintiff's Petition for Transfer of Cause of Action, which said petition for transfer of Cause of Action and which said Defendant's Compliance are in the words and figures, following, to-wit:

And the Court having examined said plaintiff's Petition for Transfer and Defendant's Compliance with the transcript of the record of the proceedings below having been tendered to the Court, the Court now orders that the transcript of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, the Administrative Adjudication Section, be filed with the Clerk of this Court and the same is now filed with the Clerk of this Court, which said transcript of proceedings is in the following words and figures, to-wit:

[fol. 10] BEFORE THE ADMINISTRATION ADJUDICATION SECTION OF THE INDIANA STATE DEPARTMENT OF REVENUE, GROSS INCOME TAX DIVISION

Cause No. 37

[Title omitted]

Bill of Exceptions

Met pursuant to notice at 10:30 a.m. on the 29th day of March, A.D. 1950, in the offices of the Indiana Department of State Revenue, Administration Adjudication Section, Indianapolis, Indiana.

Before Hearing Judge Rex R. Bridwell, duly appointed under the Administration Adjudication Act, Indiana Department of State Revenue.

BLEED THROUGH POOR COPY

APPEARANCES:

John J. McShane, Deputy Attorney General of the State of Indiana and Fred McClurg, Attorney for Indiana Department of State Revenue, Gross Income Tax Division, Appearing for the Respondent;

Mark E. Nebeker, Appearing for himself as the Protestant.

Reported by: Allan G. Sweeney, 826 Marott Hotel, Talbot—4571, Indianapolis, Indiana.

(File endorsement omitted.)

[fol. 11] PROCEEDINGS

Mr. McShane: Now, for the purpose of the record, in view of what the Court has said, I suggest this stipulation at the outset:

STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties and their respective counsel . . . I take it you are an attorney, too? . . .

Mr. Nebeker: That's right, and practiced for fourteen years; but I don't claim to be one.

Mr. McShane . . . and their respective counsels, prior to the introduction of evidence in this case, that all irrelevant, immaterial and/or duly-repetitious evidence shall be excluded from the evidence by the agent or representative hearing said cause upon motion or objection to be made.

It is further stipulated and agreed between parties hereto that the evidence of any witness shall proceed by way of a direct examination, a cross-examination, a redirect examination, a re-cross examination, and a rebuttal; that the rules of evidence as prescribed by the statute of Indiana and the rules of the Supreme Court of Indiana shall prevail.

It being understood further, in compliance with the Administrative Adjudication Act, that this hearing shall be in an informal manner and without recourse to any of the technical rules of evidence.

It is further stipulated and agreed between the parties [fol. 12] that the petitioner herein made due report and

return of his gross income tax, a liability, to the State of Indiana for the periods from January 1, 1944, to December 31, 1944, and January 1, 1945, to December 31, 1945, and January 1, 1946, to December 31, 1946.

That in the 1944 quarterly return and the annual return for said year the taxpayer indicated, in Schedule 1, certain receipts indicated as "capital gains without deductions or losses (margin account)."

That, in reporting, he, on each return, quarterly and annual in the Year 1945, in Schedule 1, indicated the following: "capital gains without deductions or losses (margin account)," in each of said quarterly returns and the annual return for 1945.

That, in reporting his tax liability for the Year 1946, in his quarterly returns, as well as his annual return, in Schedule 1, he indicated as follows: "Item 4: Capital gains without deductions for losses (margin account)."

That, in the month of October, in 1947, a few days prior to the 28th day of October, 1947, John A. Wolsieffer, a field auditor of the Indiana Gross Income Tax Division, made an audit of the books and records of the petitioner at his residence at No. 1301 South Main Street, in the City of Clinton, Vermillion County, Indiana, for the periods mentioned in this stipulation, to wit: January 1, 1944, to and including December 31, 1946.

That as a result and consequence of said audit and [fol. 13] examination an inspection of the books and records so made by said field auditor disclosed a denial of certain claims for refund made by the taxpayer in the total sum of $311.51.

That a copy of said report of said field auditor dated October 28, 1947, was duly mailed to him at his address at 1301 South Main Street, Clinton, Vermillion County, Indiana, by the Indiana Gross Income Tax Division, and said report, designated as "preliminary statement," is now marked for purpose of identification as "Respondent's Exhibit No. 1," and is now offered, introduced and read into the evidence of this cause.

That said audit was made by said field auditor pursuant to directions of the Indiana Gross Income Tax Division because of the fact that the petitioner herein duly paid

the taxes for which a claim for refund was filed for the Year 1944 in the sum of $88.29; for the Year 1945 in the total sum of $146.49, and in 1946 in the sum of $76.63, which said claim for refund was disallowed by the Indiana Gross Income Tax Division on or about December 15, 1947.

That the Indiana Gross Income Tax Division caused a letter to be written to the petitioner herein on or about December 15, 1947, advising said petitioner of this dis-[fol. 14] allowance of said claim for refund.

That thereafter the petitioner petitioned the Indiana Gross Income Tax Division for an informal hearing upon his said claim for refund, under and pursuant to the provisions of Section 14 of the Indiana Gross Income Tax Act of 1933 as amended, and said petition for hearing was filed prior to the adoption of the Administrative Adjudication Act.

That after said hearing by the Indiana Gross Income Tax Division the same was denied.

That the claim for refund by the petitioner on or about October 2, 1947, is now marked "Respondent's Exhibit 2" for purposes of identification, and is now offered, introduced and read into the evidence in this cause, and is in the words and figures following, to-wit:

(The above-mentioned document—marked "Respondent's Exhibit 2"—admitted into evidence at this time reads as follows:

EXHIBIT No. 2 TO STIPULATION

Respondent's Exhibit 2. A.G.S.
Received Oct. 2, 1947, Gross Income Tax Div.
File 83-579.
Received Oct. 2, 1947, Gross Income Tax Div. (Audit Section).
Do not Write in This Space.
Gross Income Tax Division,
Department of Treasury,
141 South Meridian Street,
Indianapolis, Indiana.

A claim for refund is hereby made in the total amount of $311.51 on account of Gross Income Tax returns filed and tax paid in the name of:

[fol. 15] Name of Taxpayer—Mark E. Nebeker.

Address—1301 S Main St., Clinton, Vermillion, Indiana covering the following periods:

Year	Claim for Refund	Amount Claimed As Refund
1944	Filed ——	$ 88.39
1945	Approved ——	$146.49
1946	Disallowed Dec. 1, 1947	$ 76.63
	Warrant No. ——	
	Date ——	

The reasons why Claim for Refund should be allowed, are as follows (explain fully):

Establishment of the non-taxability of sales of securities executed outside of the state of Indiana by decision of the United States Supreme Court in the case of Freeman Trustee vs. Hewit.

The above amounts were reported and paid on sales of securities without the state of Indiana.

(Signature) Mark E. Nebeker.

STATE OF INDIANA,
County of Vigo, ss:

Sworn to and subscribed before me this 30th day of September, 1947.

Luana Yeager, Notary Public.

My Commission expires Oct. 5, 1950.

Fiduciaries must furnish a certified copy of their appointment.

If claim or any part of claim is allowed, taxpayer will be supplied with proper state voucher for signature and notarization, which must be properly executed before actual refund is made.

[fol. 16] Mail to 141 S. Meridian, Indianapolis, Indiana.
Gilbert K. Hewit, Director Gross Income Tax Division, Department of Treasury.

POOR COPY
BLEED THROUGH

No Objections by Taxpayer.

It is further stipulated and agreed between the parties that the petitioner, Mark E. Nebeker, did on or about the 22nd day of December, 1947, file with the Indiana Gross Income Tax Division his protest protesting the order of denial of his claim, and thereafter and on the 29th day of March, 1948, the Indiana Gross Income Tax Division did acknowledge receipt of said protest made on or about December 22, 1947, and set the matter of the protest down for a hearing before the agent or representative of the Gross Income Tax Division, and, on June 2, 1948, the Gross Income Tax Division duly notified the petitioner that a hearing upon his protest would be held on June 22, 1948, in the office of the Division.

It is further stipulated and agreed that the petitioner, Mark E. Nebeker, is and for more than ten years past has been a resident of Vermillion County, Indiana.

That during the taxable Year 1944 petitioner consummated certain transactions in the purchase and sale of corporation capital stock through stock brokerage firms of [fol. 17] Thomson & McKinnon and/or James E. Bennett & Company, as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 21	Texas & Pacific R.R.	100	$79 76
Feb. 10	Texas & Pacific R.R.	100	104 57
Feb. 11	United Fruit Company	200	52 66
Mar. 10	Johns Manville	100	620 56
Apr. 11	J. C. Penney Company	100	219 80
Apr. 27	Texas Corp.	100	33 18
May 12	Commercial Credit Corp.	100	13 16
June 6	General Foods	100	39 28
June 13	Commercial Solvents	100	121 55
July 7	International Harvester	100	402 53
July 7	Sears-Roebuck	100	19 80
July 21	Eaton Manufacturing	100	397 53
Aug. 4	International Harvester	100	126 46
Sep. 8	Sears-Roebuck	100	69 80
Sep. 15	United Fruit Company	200	393 26
Nov. 8	Sears-Roebuck	100	207 30
Nov. 10	Pullman Corp.	100	203 99
Nov. 21	Eaton Manufacturing	100	21 20
Nov. 22	Johns Manville	100	7 30
Mar. 11	Caterpiller Tractor	100	40 15
Apr. 11	Southern Pacific	100	175 37
Apr. 11	Atchison, Topeka & Santa Fe	100	1,685 48
Apr. 21	Southern Pacific	100	301 56
Apr. 27	General Foods	100	18 60
Sep. 7	Cornell Doubelier	100	61 15

[fol. 18]

Date	Corporation	No. Shares	Gain
Sep. 7	Charles Pfizer	100	1,010.73
Sep. 13	United Aircraft	100	31.07
Sep. 14	General American Transport	100	672.79
Oct. 5	Commercial Solvents	100	108.90
Nov. 29	Atchison, Topeka & Santa Fe	100	1,220.58
Nov. 30	Sun Oil Company	10	70.34
Dec. 1	Allis Chalmers	100	309.33
	Total		$8,839.74

That as a result of such transactions the complainant accomplished a capital gain of $8,839.74 during the said Year of 1944.

That he reported said income as heretofore pointed out and reported other income in excess of his $1,000 exemption and paid on said reported gain at the rate of 1 per cent a gross income tax of $88.39.

That during the Year 1945 petitioner consummated transactions of purchase and sale of corporation stock through the brokerage firm of Thomson & McKinnon and/or James E. Bennett & Company as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 17	Clark Equipment	100	$239.38
Feb. 20	Union Carbide & Carbon	100	423.58
Mar. 9	Youngstown Sheet & Tube	100	568.34
Mar. 15	Skelley Oil	100	131.46
Mar. 23	Eaton Mfg. Company	100	306.23
[fol. 19]			
Apr. 2	Union Carbide & Carbon	100	198.52
Apr. 5	Johns-Manville	100	569.78
May 1	United Fruit Company	100	1,421.17
May 2	United Fruit Company	100	919.92
May 24	Eaton Mfg. Company	100	392.76
July 30	Radio Corp. of America	100	10.84
Aug. 1	Sylvania Electric Products	100	111.71
Aug. 13	Johns-Manville	100	319.75
Aug. 21	United Fruit Company	200	439.58
Sep. 15	Eaton Mfg. Co.	100	140.63
Sep. 17	Johns-Manville	100	219.73
Nov. 19	Atchison, Topeka & Santa Fe	100	1,069.79
Nov. 27	General Foods	100	189.01
Dec. 10	U. S. Industrial Chemical	100	476.04
Dec. 12	Commercial Solvents	100	416.79
Dec. 12	Minneapolis Honeywell	100	144.71
Dec. 13	Bucyrus Erie	100	24.74
Dec. 14	Commercial Credit Corp.	100	159.00
Dec. 21	Eaton Mfg. Company	100	338.87
Feb. 16	Mathison Alkali Company	100	214.47
Mar. 6	Phillips Petroleum	100	739.39
Mar. 9	Phillips Petroleum	100	653.11
Mar. 9	Gulf Oil Corp.	100	643.96
Mar. 9	Freeport Texas Sulphur	100	641.04
July 30	Radio Corp. of America	100	86.03
Dec. 19	Celanese Corp.	100	2,489.49
	Total		$14,609.82

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[fol. 20] That as a result of said transactions claimant accomplished a capital gain of $14,692 during the said Year of 1945; that he made due return to the Gross Income Tax Division, as hereinbefore stated; that in said year petitioner reported other income in excess of his $1,000 exemption, and that he paid on said reported gain at the rate of 1 per cent a gross income tax of $146.99.

That during the Year 1946 petitioner consummated transactions of purchase and sale of corporation capital stock through the stock brokerage firms of Thomson & McKinnon and/or James E. Bennett & Company, as follows, to wit:

Date	Corporation	No. Shares	Gain
Jan. 11	Eaton Manufacturing	100	$387.49
Jan. 28	Socony	100	50.43
Feb. 13	Link Belt	100	583.73
Apr. 25	Eaton Manufacturing	100	543.13
Apr. 29	Continental Can	100	647.45
May 8	Continental Can	100	21.26
May 22	U. S. Industrial Chemical	100	1,076.12
June 13	Continental Can	100	544.81
July 17	American Can	50	161.54
Jan. 15	Phillips Petroleum	100	837.63
Jan. 22	Gulf Oil	100	865.56
May 24	United Aircraft	100	80.95
June 28	United Aircraft	100	1,623.34
	Total		$7,425.44

[fol. 21] That as a result of said transactions claimant accomplished a capital gain of $7,423.44 during the said Year of 1946; that he made due return of said gross income to Indiana Gross Income Tax Division, as hereinbefore stated.

That in said year claimant reported other income in excess of his $1,000 exemption, and that he paid on said reported gain at the rate of 1 per cent a gross income tax of $74.23.

It is further agreed and stipulated that in each and every instance of purchase and sale of corporation stock as stated purchase was made by the broker and the stock credited to the account of the claimant on the books of the broker and the cost thereof was debited to the account of the claimant on the books of the broker kept in the State of Indiana. The stock certificates were never ordered out or transferred to the claim of the claimant. Neither were they ever delivered to the claimant in a street name. But

the property interest in the stock was maintained in what is commonly called a margin account.

The petitioner herein had the right to receive dividends, the dividends paid on the stock, the right to vote or direct the vote of the stock in a corporation stock-holders' meeting, the right to sell the stock and receive the proceeds. The rights of ownership, if any, are subject only to the terms of a pledge to the broker for the payment of any indebtedness that might be owing by the claimant to the broker.

It is further stipulated and agreed that as sales were [fol. 22] made by the broker upon the orders of the petitioner, the sold shares of stock were debited to the account of the petitioner and the proceeds were credited to the account of the petitioner on the books of the broker kept in the State of Indiana.

IN THE VERMILLION CIRCUIT COURT

CAUSE TRANSFERRED BY ORDER OF COURT

And this cause of action is now transferred to this Court for such further proceedings as the Court may direct.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ENDORSEMENT OF ORDER OF COMPLIANCE—Filed June 4, 1951

[File endorsement omitted.]

[fol. 23] [File endorsement omitted]

IN THE VERMILLION CIRCUIT COURT

PLAINTIFF'S REQUEST TO CHANGE TITLE AND GRANTING THEREOF—filed June 12, 1951

Comes now the plaintiff in the above entitled cause and shows to the court that in the title of this cause the name of the defendant herein was inadvertently stated as Indiana Department of State Finance, Gross Income Tax Division. Whereas the true and correct name of said defendant is Indiana Department of State Revenue. Wherefore plaintiff asks leave to correct the title of this cause to show the true name of the defendant.

And now the Court being fully advised in the premises grants plaintiff's said request and orders that the title of this cause be changed to state the name of the defendant as [fols. 24-25] Indiana Department of State Revenue, Gross Income Tax Division.

Comes now the defendant herein and tenders to the Court for filing in this cause, a transcript of all of the proceedings had before the Indiana Department of State Revenue, Gross Income Tax Division, Administrative Adjudication Section and requests that same be ordered filed by the Clerk of this Court and made a part of the record in this cause of action and that said cause of action is now transferred for such further action as the Court may direct.

And now the Court being fully advised in the premises orders that said transcript be filed by the Clerk of this Court and made a part of the record of this cause of action and the Court further orders that this cause of action is now transferred for such further action as the Court may direct.

[fol. 26] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

SECOND AMENDED COMPLAINT—Filed October 1, 1951

Comes now the plaintiff and complains of the defendant, and for cause of action says:

1

That plaintiff is, and for more than ten years last past, has been a continuous resident of, and has been domiciled in, Vermillion County, State of Indiana.

2

That ever since the enactment of the Indiana Gross Income Tax Law, being Chapter 50 of the Acts of the General Assembly of The State of Indiana, he has reported quarterly and annually to the defendant his gross income, and has paid tax thereon as provided by said act. That among the items of gross income so reported, and so paid, was income derived from the sale of intangible personal property to various vendees who were located outside the State of Indiana, and who were residents of states other than the State of Indiana.

[fol. 27]

3

That on or about the 2nd day of October, 1947, he filed with the defendant his claim for refund of gross income tax theretofore illegally assessed by defendant on said sales of intangible personal property, and paid by plaintiff, as follows:

For the year 1944	$ 88.39
For the year 1945	146.49
For the year 1946	76.63
Total	$311.51

4

That thereafter, on the 15th day of December, 1947, defendant denied plaintiff's request for refund for the years 1944, 1945 and 1946 in the total amount of $311.51.

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5

That thereafter, on or about December 22, 1947, plaintiff filed his formal protest against said order denying his claim for refund.

6

That on January 1, 1948, plaintiff's claim for refund became governed by the Administrative Adjudication Act, being Chapter 365 of the Acts of the General Assembly of the State of Indiana for the year 1947. That before a complete determination of plaintiff's claim for refund could be had under said act, the same was amended by Chapter 305, Acts of the General Assembly of the State of Indiana for the year 1951, which act provided that any pending claims for refund could, upon petition filed before [fol. 28] May 1, 1951, be transferred to the county of taxpayer's residence for final adjudication and determination.

7

That pursuant to plaintiff's petition filed prior to May 1, 1951, his claim for refund was transferred to the Vermillion Circuit Court.

8

That during the year 1944 he consum-ated transactions of purchase and sale of certain divisional interests in various corporations, commonly called corporation corporate stock, through the brokerage firms of Thomson & McKinnon and/or James E. Bennett and Company, as follows:

Date	Corporation	No. Shares	Gain
Jan. 21	Texas & Pacific R. R.	100	79.76
Feb. 10	Texas & Pacific R. R.	100	104.57
Feb. 11	United Fruit Co.	200	52.56
Mar. 10	Johns-Manville	100	620.56
Apr. 14	J. C. Penney Co.	100	219.80
Apr. 27	Texas Company	100	33.18
May 12	Commercial Credit Corp.	100	13.16
June 6	General Foods	100	29.28
June 13	Commercial Solvents	100	121.55
July 7	International Harvester	100	402.53
July 7	Sears Roebuck	100	19.80
July 21	Eaton Manufacturing	100	397.53
Aug. 4	International Harvester	100	126.46

[fol. 29]

Date	Corporation	No. Shares	Gain
Sept. 8	Sears Roebuck	100	69.80
Sept. 15	United Fruit Co.	200	393.26
Nov. 8	Sears Roebuck	100	207.30
Nov. 10	Pullman Corp.	100	203.99
Nov. 21	Eaton Manufacturing	100	21.20
Nov. 22	Johns-Manville	100	7.30
Mar. 11	Caterpillar Tractor	100	40.15
Apr. 11	Southern Pacific	100	175.37
Apr. 11	Atchison, Topeka & Santa Fe	100	1,685.48
Apr. 21	Southern Pacific	100	301.56
Apr. 27	General Foods	100	18.60
Sept. 7	Cornell Doubelier	100	61.15
Sept. 7	Charles Pfizer	100	1,010.73
Sept. 13	United Aircraft	100	31.07
Sept. 14	General American Transport	100	672.79
Oct. 5	Commercial Solvents	100	108.90
Nov. 29	Atchison, Topeka & Santa Fe	100	1,220.58
Nov. 30	Sun Oil Co.	10	70.34
Dec. 1	Allis Chalmers	100	309.33
	Total		$8,839.74

9

That during the year 1945 he consum-ated similar transactions of purchase and sale as follows:

Date	Corporation	No. Shares	Gain
Jan. 17	Clark Equipment	100	239.38
Feb. 20	Union Carbide & Carbon	100	423.58
Mar. 9	Youngstown Sheet & Tube	100	568.34
[fol. 30]			
Mar. 15	Skelly Oil	100	131.46
Apr. 2	Union Carbide & Carbon	100	198.52
Apr. 5	Johns Manville	100	569.78
May 1	United Fruit Co.	100	1,421.17
May 2	United Fruit Co.	100	919.92
May 24	Eaton Manufacturing Co.	100	392.76
July 30	Radio Corporation	100	10.84
Aug. 1	Sylvania Electric	100	111.71
Aug. 13	Johns Manville	100	319.75
Aug. 21	United Fruit Co.	200	439.58
Sept. 15	Eaton Manufacturing Co.	100	140.63
Sept. 17	Johns-Manville	100	219.73
Nov. 19	Atchison, Topeka & Santa Fe	100	1,069.79
Nov. 27	General Foods	100	189.01
Dec. 10	U. S. Industrial Chemical	100	476.04
Dec. 12	Commercial Solvents	100	416.79
Dec. 12	Minneapolis Honeywell	100	144.71
Dec. 13	Bucyrus Erie	100	24.74
Dec. 14	Commercial Credit Co.	100	159.00
Dec. 21	Eaton Manufacturing Co.	100	338.87
Feb. 16	Matteson Alkali	100	214.47
Mar. 6	Phillips Petroleum	100	739.39
Mar. 9	Phillips Petroleum	100	653.11
Mar. 9	Gulf Oil Co.	100	643.96

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Date	Corporation	No. Sahres	Gain
Mar. 9	Freeport Texas Sulphur	100	641.04
Mar. 23	Eaton Manufacturing Co.	100	306.23
July 30 [fol. 31]	Radio Corporation	100	86.03
Dec. 19	Celanese Corp.	100	2,489.49
	Total		$14,699.82

10

That during the year 1946 he consum-ated similar transactions of purchase and sale as follows:

Date	Corporation	No. Shares	Gain
Jan. 11	Eaton Manufacturing Co.	100	387.49
Jan. 28	Socony	100	50.43
Feb. 13	Link Belt	100	583.73
Apr. 25	Eaton Manufacturing Co.	100	543.13
Apr. 29	Continental Can	100	647.45
May 8	Continental Can	100	21.26
May 23	U. S. Industrial Chemical	100	1,076.12
June 13	Continental Can	100	544.81
July 17	American Can	50	161.54
Jan. 15	Phillips Petroleum	100	837.63
Jan. 22	Gulf Oil Co.	100	865.56
May 24	United Aircraft	100	80.95
June 28	United Fruit	100	1,623.34
	Total		$7,425.44

11

That in each and every instance of the purchase of corporate stock herein alleged the purchase was made by plaintiff's broker, and the stock credited to plaintiff's account on the books of the broker, and the cost was debited to plaintiff's account on the broker's book, which books were kept by the broker in the State of Indiana. Plaintiff's [fol. 32] ownership of said corporate stock was never transferred to plaintiff's name on the stock registers of the various corporations, nor were the certificates representing and evidencing said corporate stock, bearing assignments in blank, in so-called "street names", delivered to plaintiff, but were at all times kept and possessed by plaintiff's brokers in the State of New York.

12

That at all times mentioned herein the plaintiff had the right, by virtue of the contracts between him and his

brokers, to obtain the delivery and transfer of said corporate stocks to himself, the right to obtain the transfer of his ownership on the transfer books and stock registers of the various issuing corporations, the right to receive the dividends paid on said stock, the right to direct his brokers how to vote said stock at stock-holders meetings, and the right to sell said stock, and to receive the proceeds therefrom. That the certificates of stock were held by plaintiff's brokers in the State of New York as agent for plaintiff, and as pledges to said brokers as security for indebtedness that might be owing by plaintiff to his brokers.

13

That as sales of said stock were made by plaintiff said shares of stock so sold were debited to plaintiff's account by the broker, and the proceeds of sale were credited to plaintiff's account by his broker, on the broker's books, which were kept in the State of Indiana.

14

[fol. 33] That during the years 1944, 1945, and 1946, while plaintiff owned said shares of stock, as aforesaid, the State of Indiana assessed said property under the Intangibles Tax Law of the State of Indiana, and compelled plaintiff to pay the tax so assessed on said corporate stocks.

15

That each and all of said purchases and sales, as aforesaid, were made by the plaintiff through the New York Stock Exchange, acting through his brokers, as aforesaid.

16

That each and all of said purchases and sales of said property were transactions in interstate commerce and were and are exempt from the payment of Gross Income Tax to the State of Indiana; that no gross income tax was or is due or payable to the State of Indiana on account of the same by reason of the fact that all of said transactions constituted, and were, interstate commerce, and the gross receipts of plaintiff were receipts from business conducted

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in commerce between the State of Indiana, the State of New York, or other states of the United States. That the gross income tax collected thereon constituted an unlawful regulation of, and an illegal burden upon commerce between the State of Indiana and the other states of the United States in conflict with Article I, Section 8 of the Constitution of the United States, and that the State of Indiana, and the defendant herein, were and are prohibited from taxing such gross income or receipts under the Gross Income Tax Law of 1933, and laws amendatory thereof and supplemental thereto.

[fol. 34] 17

Wherefore, plaintiff prays and demands judgment against the defendant for the sum of $311.51, together with interest thereon from the date of payment of said tax, for the costs of this action, and for all proper relief in the premises.

Raymond O. Evans, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 35] In the Vermillion Circuit Court

[Title omitted]

Peremptory Rule to Answer—October 23, 1951

Defendant ruled to answer plaintiff's second amended complaint on or before November 1, 1951.

Record read and signed in open Court this 23rd day of October, 1951.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

[fol. 36] ANSWER TO SECOND AMENDED COMPLAINT—November 1, 1951

Comes now the defendant in the foregoing cause of action and for answer to plaintiff's second amended complaint, alleges and says:

1. Defendant admits the material allegations contained in numerical paragraphs four (4), five (5), six (6) and seven (7) of plaintiff's second amended complaint herein.

2. Defendant, with respect to numberical paragraph three (3) of plaintiff's second amended complaint, admits that the plaintiff did on or about the 2nd day of October, 1947, file a Claim for Refund of Gross Income Tax for the years and amounts specified in said paragraph, but defendant denies that the taxes sought to be refunded were illegally assessed by defendant on said sales of intangible personal property.

3. Defendant is without information and/or *or* knowledge concerning the allegations contained in numerical paragraphs one (1), two (2), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15) of plaintiff's second amended complaint.

4. Defendant denies the material allegations contained in numerical paragraph sixteen (16) of Plaintiff's second amended complaint.

5. With respect to any paragraph, sentence or phrase not heretofore admitted or denied, defendant now [fols. 37-38] specifically denies each such paragraph, sentence or phrase.

Wherefore, defendant prays judgment for its costs and for all other necessary and proper relief in the premises.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

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[fol. 39] ARGUMENT AND SUBMISSION—April 7, 1952

(omitted in printing)

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

STIPULATION—Filed April 7, 1952

It is agreed and stipulated by and between the parties that the evidence in this cause, heretofore given at the trial had before the Administrative Adjudication Section of the Indiana Department of State Revenue, shall be considered as evidence in the said cause. That in addition thereto it is stipulated that the Department of State, Revenue, Intangible Tax Division, assessed intangible tax against the plaintiff herein covering the securities listed in rhetorical paragraphs 8, 9 and 10 of the Second Amended Complaint for the years 1944, 1945 and 1946, and that the plaintiff paid the taxes thereon. That said evidence before the Administrative Adjudication Section of the Indiana Department of State Revenue and the additional evidence herein before stipulated shall be all the evidence in said cause, and that such evidence, after its introduction, [fol. 40] reading and admission into the evidence by the Court, shall be all of the evidence forming and constituting the Bill of Exceptions in this cause.

It is further agreed and stipulated that upon the acceptance and admission by the Court of such evidence forming the Bill of Exceptions, that the plaintiff and the defendant rest.

It is further agreed and stipulated by and between the parties that in the event that an appeal is taken by either party in this cause of action to a court of appellate jurisdiction, it will be unnecessary for the clerk in preparing the record, to incorporate into the same the Transcript of the proceedings before Administrative Adjudication which were filed with the Clerk of the Court to comply with the petition for transfer from the Administrative Adjudication Section of the Indiana Department of State Revenue,

and which appears among the papers in the record of the Clerk of the Court.

Further that the praecipe for the Record may direct that a Bill of Exceptions shall be included in the Transcript for appeal and the original may be utilized, without copying.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant; Raymond O. Evans, [fol. 41] Crawfordsville, Indiana, Attorney for Plaintiff.

(File endorsement omitted.)

IN THE VERMILLION CIRCUIT COURT, JANUARY TERM, 1952

[Title omitted]

BILL OF EXCEPTIONS—Filed April 7, 1952

Be it remembered that on the 7th day of April, 1952, it being the 73rd day of the January Term, 1952, of the Vermillion Circuit Court, Honorable Frank Fisher, Judge, presiding, the following proceedings were had in this Cause.

The Cause being at issue and being submitted to the Court for trial, the Parties to maintain the issues on their behalf, introduced the following evidence.

[fol. 42] [File endorsement omitted]

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

STIPULATION

It is agreed and stipulated by and between the parties that the evidence in this cause, heretofore given at the trial had before the Administrative Adjudication Section

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of the Indiana Department of State Revenue, shall be considered as evidence in the said cause. That in addition thereto it is stipulated that the Department of State Revenue, Intangible Tax Division, assessed intangible tax against the plaintiff herein covering the securities listed in rhetorical paragraphs 8, 9 and 10 of the Second Amended Complaint for the years 1944, 1945 and 1946, and [fol. 43] that the plaintiff paid the taxes thereon. That said evidence before the Administrative Adjudication Section of the Indiana Department of State Revenue and the additional evidence herein before stipulated shall be all the evidence in said cause, and that such evidence after its introduction, reading and admission into the evidence by the Court, shall be all of the evidence forming and constituting the Bill of Exceptions in this cause.

It is further agreed and stipulated that upon the acceptance and admission by the Court of such evidence forming the Bill of Exceptions, that the plaintiff and the defendant rest.

It is further agreed and stipulated by and between the parties that in the event that an appeal is taken by either party in this cause of action to a court of appellate jurisdiction, it will be unnecessary for the clerk in preparing the record, to incorporate into the same the Transcript of the proceedings before Administrative Adjudication which were filed with the Clerk of the Court to comply with the petition for transfer from the Administrative Adjudication Section of the Indiana Department of State Revenue, and which appears among the papers in the record of the Clerk of the Court.

Further that the praecipe for the Record may direct that a Bill of Exceptions shall be included in the Transcript for appeal and the original may be utilized, without copying.

J. Emmett McManamon, Attorney General, John [fol. 44] J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant; Raymond O. Evans, Crawfordsville, Indiana, Attorney for Plaintiff.

[fol. 45] IN THE VERMILLION CIRCUIT COURT

The Cause having been submitted to the Court without the intervention of a Jury, the parties hereto stipulated entire evidence in this Cause. Whereupon the plaintiff rested. Defendant reste[illegible] And this was all the evidence given in the trial of said Cause.

ORDER ALLOWING BILL OF EXCEPTIONS—December 8, 1952

Be it further remembered, that afterwards on the 8th day of December, 1952, the defendant presented and tendered to the said Frank Fisher, Judge of Said Court, this, its Bill of Exceptions, for his signature and prayed the same might be signed, sealed and made a part of the record of said cause, and which said Bill of Exceptions is now here on this 8th day of December, 1952, allowed and signed and filed by the said Frank Fisher, as such Judge, to be and constitute a part of the record and proceedings of said Cause.

And I now certify that the above Bill of Exceptions is full, true and correct, and contains all of the evidence offered and given, together with all objections, motions, and rulings made in connection therewith, in the trial of this action.

(Signed) Frank Fisher, Judge, Vermillion Circuit Court.

(File endorsement omitted.)

[fol. 46] IN THE VERMILLION CIRCUIT COURT

CAUSE TAKEN UNDER ADVISEMENT BY COURT

And the Court having heard the argument of counsel now takes the matter under advisement and continues the same for ruling.

Record read and signed in open Court this 7th day of April, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

Cause 19115

MARK E. NEBEKER

vs.

INDIANA DEPARTMENT OF REVENUE, GROSS INCOME TAX DIVISION

JUDGMENT—May 29, 1952

The Court having heretofore heard the evidence herein and heard argument of counsel and examining briefs and being duly advised now finds for the plaintiff that the allegations of plaintiff's complaint are true and that Department of State Revenue, State of Indiana, Gross Income Tax Division, is indebted to plaintiff herein in the sum of $311.51, being the amount of tax paid by plaintiff under protest, plus interest in the amount of $69.81 thereon.

It is therefore, ordered, adjudged and decreed that plaintiff have and recover of the defendant herein judgment in the sum of $311.51 principal and $69.81 interest together with costs laid out and expended herein.

[fol. 47] Record read and signed in open Court this 29th day of May, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

DEFENDANT'S MOTION FOR NEW TRIAL—June 27, 1952

Comes now the defendant, Indiana Department of State Revenue, Gross Income Tax Division, in the foregoing cause of action and respectfully moves the Court for a new [fol. 48] trial, and for grounds therefor states:

1. The decision of the Court is not sustained by sufficient evidence;
2. The decision of the Court is contrary to law.

Wherefore, the aforesaid said defendant respectfully moves the Court for a new trial in said cause and for all other necessary and proper relief in the premises. Defendant respectfully requests oral argument on motion.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

[fol. 49] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—October 7, 1952

The Court being duly advised now overrules defendant's motion for New Trial.

Record read and signed in open Court this 7th day of October, 1952.

[fol. 50] Frank Fisher, Judge Vermillion Circuit Court.

IN THE VERMILLION CIRCUIT COURT

[Title omitted]

DEFENDANT'S EXCEPTION TO RULING OF THE COURT, PRAYER FOR APPEAL AND GRANTING THEREOF

Comes now defendant by counsel and excepts to the ruling of the court heretofore entered in this cause on the 7th day of October, 1952, Exception granted.

Defendant now prays appeal to the Indiana Supreme Court. Appeal granted, Defendant is given ninety days in which to file any and all bills of exceptions herein.

Record read and signed in open Court this 10th day of October, 1952.

Frank Fisher, Judge Vermillion Circuit Court.

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[fol. 51] IN THE VERMILLION CIRCUIT COURT

[Title omitted]

PRAECIPE—October 17, 1952

To the Clerk of the Vermillion Circuit Court of Vermillion County, Indiana:

You are hereby respectfully requested to prepare and certify a full, true and complete Transcript of the Entire and All of the Record in the above entitled cause to be used upon and for an appeal to the Indiana Supreme Court of the State of Indiana, except that you will include therein the [fol. 52] original Bill of Exceptions containing the evidence instead of a copy thereof, in which final judgment was rendered on the 7th day of October, 1952, and to include the following: A full, true and complete Transcript of the entire and all of the record and the original Bill of Exceptions, and all papers filed and on file in said cause.

J. Emmett McManamon, Attorney General, John J. McShane, Lloyd C. Hutchinson, Joseph E. Nowak, Robert F. Wallace, Deputies Attorney General, Attorneys for Defendant.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] IN THE SUPREME COURT OF INDIANA

Comes now the parties by counsel and the court being advised in the premises, affirms the judgment of the court below in the following opinion pronounced by Flanagan, J.

OPINION—December 15, 1953

In the case of *Freeman* v. *Hewit* (1947), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, the Supreme Court of the United States decided that an Indiana citizen who bought stock on the New York Stock Exchange was engaged in interstate commerce, and therefore was not subject to tax

on those transactions under the Gross Income Tax Law of the State of Indiana. In that case the Indiana citizen actually bought and paid for the stock.

The question here presented is whether that decision governs buying on margin.

The factual difference, as we understand it, is that when stock is bought on margin the broker advances a percentage of the purchase price, holds a lien on the stock for his advancement, and does not permit the stock certificate to be put in the name of the customer unless the customer pays in full, which rarely happens.

[fol. 55] This factual difference merely relates to the method of financing.

However, the State of Indiana contends that transactions of this kind are only matters of bookkeeping; that, since the stock certificates themselves do not cross state lines, no question of interstate commerce is involved.

We cannot agree. Importance cannot attach to whether a piece of paper goes over state boundaries. Importance must attach to whether the *transaction itself* was a part of interstate commerce.

As the Supreme Court of the United States pointed out in the case of *Freeman* v. *Hewit*, *supra*, the vital question in each case is whether the *sale itself* was in the field of interstate commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference.

The trial court held that the facts in this case bring it within the rule laid down in the *Freeman Case*. We think the trial court was correct.

Judgment affirmed.

Dissenting Opinion

Come now Emmert, J., and dissents with an opinion in [fol. 56] the above entitled appeal, Draper, C. J., concurs in same, which opinion is in the words and figures following, to-wit:

The net effect of the majority opinion is a decision that a net income tax assessed against a resident of Indiana upon his capital gains realized from sales of common stock on

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the New York Stock Exchange, when the certificates remained in New York, violates the Commerce Clause of the Federal Constitution. This contravenes the ruling precedents of the Supreme Court of the United States, which are binding on this court, on the right of the states to impose taxes which are not in violation of the Commerce Clause.

The appellee, hereafter referred to as the taxpayer, was a resident of and domiciled in Indiana and in the years 1944, 1945 and 1946, through two brokerage firms who had branch offices in Indiana, bought and sold corporate stocks on the New York Stock Exchange. The stocks here involved were bought and sold on a margin account, the certificates being taken in a street name, and held by the brokers in New York as agents for the plaintiff. The certificates were pledged to the brokers as security for any indebtedness that might be owing from the taxpayer to his brokers. Under the stipulation made in the trial court by the appellant, hereinafter referred to as Indiana, and the taxpayer, the difference between the sale price, and the purchase price paid by the taxpayer at the time of acquisi-[fol. 57] tion, resulted in a gain in each transaction in the total sums as follows:

Years	*Number of Sales*	*Shares Sold*	*Gains*
1944	32	3,310	$ 8,839.74
1945	31	3,200	14,699.82
1946	13	1,250	7,425.44

No losses sustained by the taxpayer from the sale of any corporate stock were deducted from these gains. The taxpayer allocated his $1,000 deduction under $64-2605(b), Burns' 1951 Replacement, to other transactions, and asserted in the trial court he was entitled to a refund for taxes paid as follows:

1944 claimed refund	$ 88.39
1945 claimed refund	$146.99
1946 claimed refund	$ 76.63
Total claimed refund	$311.51

We are not concerned in this appeal with the validity of Regulation 1005 since the taxpayer paid the taxes in dispute

under the assumption that it applied to him, and Indiana asserts that this regulation furnishes the basis for computing the taxes owed for the respective years.

We should not let the decision in this case be influenced by the name given the Act by the General Assembly.[1]

"In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, [fol. 58] 177; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435." *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U. S. 359, 363, 61 S. Ct. 586, 85 L. Ed. 888, 132 A.L.R. 475.[2]

In considering the validity of the various provisions of the Indiana Act, the Supreme Court of the United States has held that the provisions then before it substantially imposed a tax on gross receipts, and was therefore analogous to a sales tax. *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 311, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429; *Harvester Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313; *Freeman* v. *Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

However, under the law and the facts in this appeal the tax asserted by Indiana is not a gross receipts tax under any possible definition of the term. It is a tax upon the capital gain in each transaction, with no deduction permitted for transactions in which the taxpayer may have sustained a capital loss by sale of corporate stock at less

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[1] "This act may be cited as the Gross Income Tax Act of 1933." Section 64-2601, Burns' 1951 Replacement.

[2] "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon gross receipts from an interstate sale.' Lockhard, Gross Receipts Taxes on Interstate Transportation and Communications, 57 Harv. L. Rev. 40, 87." *Harvester Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 346, 64 S. Ct. 1019, 88 L. Ed. 1313.

than the purchase price. Therefore the decisions in *Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 311, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429, *supra* and *Freeman* v. *Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, *supra*, establish no basis for holding the taxpayer immune from the Indiana tax on his capital gains.

In substance, Indiana has sought to impose a net income tax on the capital gains transactions realized on a margin stock account, by an Indiana resident domiciled in this [fol. 59] state. The fact that from an accounting standpoint the taxpayer had other costs in the transactions which he may not deduct for the purpose of computing the tax, does not make the tax any the less a net income tax. It could hardly be contended that §23(h) of Ch. 1 of the U. S. Internal Revenue Code, 26 U.S.C.A. §23(h), which provides that, "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions," makes the Act a tax on gross receipts. See also §117(d) of Ch. 1 of the U. S. Internal Revenue Code, 26 U.S.C.A. §117(d).[3]

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax

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[3] (1) "In the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges.

(2) "In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, 'net income' as used in this paragraph shall be read as 'adjusted gross income'. Section 117(d), Ch. 1, U. S. Internal Revenue Code, 26 U.S.C.A. §117(d)."

upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises, [fol. 60] treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." *U. S. Glue Co.* v. *Oak Creek* (1918), 247 U. S. 321, 328, 329, 38 S. Ct. 499, 62 L. Ed. 1135. The Indiana tax in controversy here violates neither the Commerce Clause nor the Fourteenth Amendment of the Federal Constitution.

The judgment of the trial court should be reversed.

Draper, C. J., concurs in this opinion.

[fol. 61] [File endorsement omitted]

[fol. 62] [File endorsement omitted]

IN THE SUPREME COURT OF INDIANA

PETITION FOR REHEARING—Filed January 4, 1954

Comes now the appellant in the foregoing captioned appeal and, pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana, respectfully petitions this Court

for a rehearing upon its opinion, decision and judgment entered December 15, 1953, for the following reasons:

1. The Court, in its majority opinion, erred in having considered the receipts herein taxed as gross receipts from interstate sales, whereas said receipts admittedly consisted of "capital gains" from investments made by appellee, a resident and domiciliary of Indiana.

2. The Court, in its majority opinion, erred in having considered the case of *Freeman* v. *Hewit*, 1946, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265 as controlling,—said authority being applicable to a gross receipts tax imposed upon gross receipts from interstate sales, whereas the instant case concerns a gross earnings tax imposed upon [fol. 63] capital gains from investments made by appellee, a resident and domiciliary of Indiana.

3. The Court, in its majority opinion, erred in holding that the income tax herein assessed against appellee, a resident and domiciliary of Indiana, upon his capital gains violates the Commerce Clause of the Federal Constitution.

4. The Court, in its majority opinion, erred in holding in effect that a tax on capital gains or gross earnings, remaining after the deduction of costs of acquisition, is subject to the same objections, under the Commerce Clause, as a tax imposed upon gross receipts without any deductions whatsoever.

5. The Court erred in holding that the transactions resulting in the capital gains herein taxed were in interstate commerce, whereas the appellee, an Indiana resident, was not required to perform any act in interstate commerce.

Wherefore, appellant respectfully prays that this, its petition for rehearing, be granted; that the Court adopt the dissenting opinion entered December 15, 1953 as its opinion; that the decision, judgment and decree of the trial court be reversed in all things and for all other necessary and proper relief in the premises.

Respectfully submitted, (S.) Edwin K. Steers, Attorney General, Lloyd C. Hutchinson, Deputy Attorney General.

[fol. 64] IN THE SUPREME COURT OF INDIANA

ORDER DENYING PETITION FOR REHEARING—January 27, 1954

Come now the parties by counsel and the court, being advised in the premises, denies the appellant's petition for rehearing heretofore filed herein. Draper, C. J., Emmert, J., and Draper, C. J. dissent.

[fol. 65] IN THE SUPREME COURT OF INDIANA

[Title omitted]

STIPULATION CONCERNING PARTS OF RECORD TO BE OMITTED FROM RECORD AS CERTIFIED TO CLERK OF THE UNITED STATES SUPREME COURT—Filed March 16, 1954

The parties to the above captioned cause, by counsel, stipulate that the Clerk of the Indiana Supreme Court shall [fol. 66] *omit* from the record therein, as certified to the Clerk of the United States Supreme Court, the following:

1. Pages I to VIII inclusive. (Index to Record on file with the Clerk of Indiana Supreme Court.)
2. Page 3, l. 2 to page 5, l. 15, inclusive. (Petition for Transfer to the Vermillion Circuit Court from the Administrative Adjudication Section of the Indiana Department of State Revenue, Gross Income Tax Division).
3. Page 5, l. 18 to page 15, l. 11, inclusive. (Original Complaint, Endorsement on Complaint, Praecipe for Summons.)
4. Page 15, l. 18 to page 18, l. 27, inclusive. (Issuance of Summons, Summons, Endorsement and Return on Summons, Filing of Appearance, Appearance, Endorsement on Appearance.)
5. All of pages 23 and 24. (Minute and Order Book Entries of Administrative Proceedings before Indiana Department of State Revenue.)
6. Page 28, l. 14 to page 31, l. 27, inclusive. (Exhibit 1 to Stipulation, which is the Preliminary Statement

of John A. Wolsieffer, Field Auditor for Gross Income Tax Division, dated October 28, 1947.)

7. Page 42, l. 8 to page 60, l. 27, inclusive. (Testimony of Mr. Wolsieffer, Gross Income Tax Division Auditor, Recommended Special Findings of Fact and Conclusions of Law of Administrative Hearing Agent, [fol. 67] Protestant's Objections to such Recommended Findings, Order of Revenue Board ordering hearing on Protestant's Objections, Certificates of Administrative Adjudication Section Reporter and Hearing Agent.)

8. Page 61, l. 16 to page 63, l. 17, inclusive. (Entry of Filing of Defendant's Motion to Require Plaintiff to Separate and Number Paragraphs of Complaint, that motion and endorsement thereon.)

9. Page 65, l. 2 to page 80, l. 20, inclusive. (Court orders filing of Amended Complaint, Amended Complaint (First), Endorsement on Amended Complaint, Peremptory Rule to Answer, Entry of Filing of Defendant's Motion to Strike, Motion to Strike, Endorsement on Motion to Strike, Argument thereon, Ruling of Court on Motion to Strike.)

10. Page 92, l. 6 to page 93, l. 27, inclusive. (Certificate of Mailing of Defendant's Answer, Endorsement on Answer, Entry of Assignment of Cause for Trial, Plaintiff's Request and Granting of Request to Remove Record.)

11. Page 100, l. 17 to 27, inclusive. (Consists of Marginal Note by Appellant, which extends into the body of page 100.)

12. Page 104, l. 23 to page 106, l. 21, inclusive. (Endorsement on Defendant's Motion for New Trial, Certificate of Mailing of Defendant's Motion for New Trial, Assignment for Hearing of Defendant's Motion [fol. 68] for New Trial, Entry of Oral Argument on Motion for New Trial, Ruling thereon taken under advisement.)

13. Page 108, l. 8 to page 111, l. 9, inclusive. (Notice of Appeal to Plaintiff, Acknowledgment of Service thereof and Endorsement thereon, Notice of Appeal to Clerk and Endorsement thereon.)

14. Page 112, 11. 11-27, inclusive. (Endorsement on Praecipe filed with Clerk of Vermillion Circuit Court.)

15. Page 113, 1. 6 to page 114, 1. 27, inclusive. (Entry of tender of Bill of Exceptions with Lower Court, Approval thereof by Lower Court.)

16. Also *omit* all entries and proceedings in the Indiana Supreme Court, *except the following:*

(a) Entry of submission of Record and Assignment of Errors, dated January 5, 1953.

(b) Entry of decision and opinions of Indiana Supreme Court, dated December 15, 1953.

(c) Majority and Dissenting Opinions, dated December 15, 1953.

(d) Entry of filing of Appellant's Petition for Rehearing on January 4, 1954.

(e) Appellant's Petition for Rehearing as filed on January 4, 1954.

(f) Entry of Denial of Appellant's Petition for Rehearing on January 27, 1954.

(g) Entry of filing of this Stipulation.

(h) This Stipulation.

[fol. 69] (i) Entry of filing of Praecipe with Clerk of Indiana Supreme Court.

(j) Praecipe as filed with Clerk of Indiana Supreme Court.

Dated this 16th day of March, 1954.

(S.) Raymond O. Evans, Attorney at Law, Attorney for Respondent, Ben Hur Building, Crawfordsville, Indiana; Edwin K. Steers, Attorney General of Indiana, Carl M. Franceschini, Cornelius G. Jamison, Lloyd C. Hutchinson, Deputies Attorney General of Indiana, Attorneys for Petitioner, 219 State House, Indianapolis, Indiana.

(File endorsement omitted.)

[fols. 70-71] PRAECIPE FOR TRANSCRIPT OF RECORD

(Omitted in printing)

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, Petitioner,

vs.

MARK E. NEBEKER

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY

Office - Supreme Court,
APR 27 1954
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ~~731~~ 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, *Petitioner,*

vs.

MARK E. NEBEKER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

EDWIN K. STEERS,
Attorney General;
CARL M. FRANCESCHINI,
CORNELIUS G. JAMISON.
LLOYD C. HUTCHINSON,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 731

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, *Petitioner,*

vs.

MARK E. NEBEKER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MAY IT PLEASE THE COURT:

The Gross Income Tax Division of the Indiana Department of State Revenue of the State of Indiana, petitioner herein, respectfully prays that a Writ of Certiorari issue to review the opinion, decision and judgment of the Supreme Court of Indiana (by its majority opinion), entered in the above-entitled case on December 15, 1953.

Summary Statement of the Matter Involved

The Nature of the Action:

This action, commenced in the Vermillion Circuit Court of Vermillion County, Indiana (47th Judicial Circuit of Indiana), and thereafter appealed to the Supreme Court of Indiana, is one to recover taxes imposed upon the receipt of capital *gains* by respondent, domiciled and residing in Indiana, derived from his marginal stock transactions.

The Facts:

The facts are embodied in two Stipulations of Facts entered of record in the trial court, and may be found in the record submitted herewith at pages 5 to 12, inclusive ("Stipulation of Facts") and Pages 22 and 23 (supplementary "Stipulation").

So much of the facts as are necessary for a complete understanding of the questions herein presented are as follows:

Respondent is a resident of Indiana (R. p. 9, ll. 15-17). During the years 1944, 1945 and 1946, respondent consummated certain stock transactions through the stock brokerage firms of Thomson and McKinnon and/or James E. Bennett and Company (R. p. 9, l. 18 to p. 11, l. 33, inclusive). In each of said transactions, the purchase of said stock was made by the broker, the stock credited to the account of respondent on the books of the broker and the cost thereof debited to the account of respondent on the books of the broker kept in the State of Indiana. The stock certificates were never ordered out or transferred to respondent, nor were they ever delivered to respondent in a street name, but the property interest in such stock was maintained in what is commonly called a margin account (R. p. 11, l. 38 to p. 12, l. 2).

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The respondent had the right to receive the dividends paid on such stock, the right to vote or direct the vote of such stock in stockholders' meetings, and the right to sell the same and receive the proceeds. The rights of ownership thereto are subject only to the terms of a pledge to the broker for the payment of any indebtedness which might be owing by respondent to the broker (R. p. 12, ll. 3-10).

Upon orders of respondent, sales of such stock were made by the broker, who debited the stock sold to the account of the respondent, and the proceeds therefrom were credited to the respondent's account on the books of the broker kept in the State of Indiana (R. p. 12, ll. 11-16). Such transactions and the gains derived therefrom were as follows:

Years	*Number of Sales*	*Shares Sold*	*Gains*
1944	32	3310	$8,839.74
1945	31	3200	14,699.82
1946	13	1250	7,425.44

(R. p. 9, l. 18 to p. 11, l. 29, inclusive)

For each of said years, respondent reported such *gains* in his tax returns as "capital gains without deductions or losses (margin account)" (R. p. 6, ll. 5-17, inclusive). The amounts of tax paid on said "gains" and of which a refund is sought herein are as follows:

Year	*Amount claimed as Refund*
1944	$88.39
1945	146.99
1946	74.23

(R. p. 10, ll. 13-16, inclusive;
p. 11, ll. 1-7, inclusive;
p. 11, ll. 34-37, inclusive;
p. 7, l. 19 to p. 8, inclusive).

In addition to the tax herein involved, respondent paid intangibles tax to the State of Indiana on the securities herein, the liability for which is not in issue (R. p. 23, ll. 2-8, inclusive).

Opinions Below

The majority opinion, decision and judgment of the Indiana Supreme Court (R. p. 27, l. 23 to p. 28, l. 32, inclusive) and the dissenting opinion of EMMERT, J., in which DRAPER, C. J. concurred (R. p. 28, l. 33 to p. 32, l. 26), as yet unreported officially, are unofficially reported in 116 N. E. (2d) 104 of the West Reporter System, and are reproduced herein as "Appendix A" and "Appendix B" respectively, of this petition.

Statute and Regulations Involved

The statute involved is the Indiana Gross Income Tax Act of 1933, as amended (Indiana Acts of 1933, Chapter 50; Indiana Acts of 1937, Chapter 117, and succeeding amendatory acts), and may be found complete with amendments to date in Burns' Indiana Statutes Annotated, 1951 Replacement, Vol. 11, Part 2, Sections 64-2601 to 64-2635, both inclusive. Pertinent provisions of said Act are reproduced herein as "Appendix C" of this petition.

The specific regulations of petitioner, under which the tax herein was paid, as last promulgated on April 27, 1946, are as follows:

Regulation 2805:

> "MARGINAL TRANSACTIONS. Any taxpayer dealing on margin will report his gross earnings from such transactions. Gross earnings in such cases will be the gross profits realized, whether received or credited to his account, where securities or commodities are sold for any

amount in excess of cost, without any deductions for losses incurred when securities or commodities are sold for an amount less than cost, and also without any deductions for taxes, brokerage commissions or other expenses incident to the transaction."

Regulation 1005:

"Gross Earnings Means Generally the gross profits on individual transactions before costs of effecting the transactions are deducted, and with reference to sales of property such gross earnings means and includes only the gross difference between the cost of such property, as of the date of its final acquisition by the taxpayer, and the *gross* receipts resulting from the sale of such property. It also includes gross commissions, interest, dividends, fees, etc. In computing "gross earnings" no deductions can be taken for losses on any transactions. "Gross Earnings" is stipulated as being the "Gross Income" for taxation of banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit. (Sec. 1n; Sec. 1p.)"

The foregoing regulations in substance are the same as the corresponding regulations which have been in effect since July 1, 1934, excepting only minor variations in wording and identified by different numbers.

Jurisdiction

The issue of alleged interstate commerce immunity as applied to the receipts of respondent's capital gains herein was raised in the Court of the first instance in the Vermillion Circuit Court of Vermillion County, Indiana, by the filing of respondent's second amended complaint on October 1, 1951 (numerical paragraph 16 thereof.) (R. p. 14, l. 1 to p. 19, l. 20, inclusive). Said complaint is based

solely upon the allegation of interstate commerce immunity. This cause was put at issue in the trial court by the filing of petitioner's answer of denial. (R. p. 20).

Upon the admission and conclusion of evidence, and submission of the cause, the Court of first instance entered its general finding that the allegations of respondent's complaint were true and judgment for respondent that the income herein was immune from taxation by virtue of the Commerce Clause. (R. p. 25, ll. 1-28, inclusive)

The question of alleged interstate commerce immunity was pursued by petitioner from the Court of first instance by the filing of petitioner's Motion for New Trial, (R. p. 25, l. 32 to p. 26, l. 8 inclusive), which was overruled by said Court. (R. p. 26, ll. 13-25, inclusive). Thereafter, the question of alleged interstate commerce immunity was submitted to the Indiana Supreme Court by the filing of the Transcript of the Record, together with petitioner's Assignment of Errors. (R. p. 1). After briefing and argument, the Indiana Supreme Court, on December 15, 1953, by a divided Court, entered its written opinion, decision and judgment, based solely on the question of interstate commerce immunity, in which said majority opinion it concluded as follows:

> "• • • As the Supreme Court of the United States pointed out in the case of *Freeman* v. *Hewit*, *supra*, the vital question in each case is whether the *sale itself* was in the field of inter-state commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference.
>
> "The trial court held that the facts in this case bring it within the rule laid down in the *Freeman Case*. We think the trial court was correct.
>
> "Judgment affirmed.

"Emmert, J. dissents with an opinion; Draper, C. J. concurs in dissent." (116 N. E. (2d) at p. 105)

Thereafter, and within the time allowed by the Rules of the Supreme Court of Indiana, the petitioner herein filed its Petition for Rehearing (R. p. 32, l. 36 to p. 33, incl.) which was denied by the Indiana Supreme Court on January 27, 1954 (R. p. 34, ll. 1 to 9), Emmert, J. and Draper, C. J. dissenting. The opinion, decision and judgment of the Indiana Supreme Court was rendered by the highest Court of the State of Indiana from which a decision could be had and is a final judgment, subject to no further review or correction in any other state tribunal.

The issue in this case and the holding of said Court, of which review is sought by this Honorable Court, draws in question the validity of a state statute and regulations thereunder on the grounds of being repugnant to the United States Constitution, viz: The Commerce Clause, Article I, Section 8, Clause 3.

The statutory provisions believed to sustain the jurisdiction of this Honorable Court are: Section 1257 (3) and Section 2101 (*e*) of Title 28 of the U. S. Code Annotated.

The Questions Presented

I

Does interstate commerce immunity extend to the taxation of capital *gains* derived from marginal stock transactions, such gains consisting of the gross *difference* between the cost of the property upon acquisition by the taxpayer and the gross receipts from its sale, with no deduction permitted for transactions in which the taxpayer may have sustained a loss by sale of corporate stock at less than the purchase price, the recipient of such gains being a resident of the State seeking to tax?

II

Are capital gains from marginal stock transactions derived from interstate commerce when there is no evidence that the recipient of such gains ever owned specific, identifiable shares, or that any stock ever crossed state lines, or that such recipient ever performed any act in interstate commerce?

Petitioner's Specification of Error

1. The Indiana Supreme Court, in its majority opinion, erred in having considered the receipts herein taxed as gross receipts from interstate sales, whereas said receipts admittedly consisted of "capital gains" from investments made by respondent, a resident and domiciliary of Indiana, the State seeking to tax.

2. The Indiana Supreme Court, in its majority opinion, erred in having considered the case of *Freeman* v. *Hewit*, 1946, 329 U. S. 249; 67 S. Ct. 274; 91 L. Ed. 265, as controlling,—said authority being applicable to a gross receipts tax imposed upon gross proceeds from interstate sales, whereas the instant case concerns a gross earnings tax imposed upon capital gains from investments made by respondent, a resident and domiciliary of Indiana, the State seeking to tax.

3. The Indiana Supreme Court, in its majority opinion, erred in holding that a tax on capital gains or gross earnings, remaining after the deduction of costs of acquisition, is subject to the same objections, under the Commerce Clause, as a tax imposed upon gross receipts without any deductions whatsoever.

4. The Indiana Supreme Court erred in holding that the transactions resulting in the capital gains herein taxed were in interstate commerce, when there is no evidence that re-

spondent was required to perform or performed any act in interstate commerce.

Reasons Relied Upon For the Allowance of the Writ

The final opinion, decision and judgment of the Indiana Supreme Court, rendered by the highest court of the State of Indiana in which a decision could be had, draws in question the validity of a state statute and regulations thereunder solely on the ground of being repugnant to the Federal Constitution, viz: the Commerce Clause. Said Court has decided a federal question of substance not heretofore determined by this Court, and in a way probably not in accord with applicable decisions of this Court.

1. As stated in this case by the dissenting opinion:

> "The net effect of the majority opinion is a decision that a net income tax assessed against a resident of Indiana upon his capital gains realized from sales of common stock on the New York Stock Exchange, when the certificates remained in New York, violates the Commerce Clause of the Federal Constitution."

This is contrary to well established, long standing and currently applicable precedents of this Honorable Court. The sole authority for the majority opinion is the well known case of *Freeman* v. *Hewit* (1946) 329 U. S. 249; 67 S. Ct. 274; 91 L. Ed. 265, which concerned a gross receipts tax as applied to the unapportioned gross proceeds from interstate sales.

In the *U. S. Glue Co.* v. *Oak Creek* (1918) 247 U. S. 321; 38 S. Ct. 499; 62 L. Ed. 1135, this Court recognized and explained the manifest and substantial difference between a tax measured by gross receipts and one measured by net income when it was held:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, rec-

ognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and *irrespective of whether it is profitable or otherwise.* Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. *A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.* Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." (Emphasis supplied)

(247 U. S. 321, at pp. 328, 329)

In *Atlantic Coast Line* v. *Daughton* (1923) 262 U. S. 413; 43 S. Ct. 620; 67 L. Ed. 1051, the question was whether an income tax law of North Carolina was unconstitutional under the Commerce Clause because certain deductions were not allowed the taxpayer, the argument being that the State's definition of net income differed from that adopted by the Interstate Commerce Commission. In upholding the tax in that case, this Court, in footnote (6) of 262 U. S., at p. 422, said:

"'[6] The term 'net income' in law or in economics, has not a rigid meaning. Every income tax act neces-

sarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income is exempt from taxation. These details are largely a matter of governmental policy. As to them States differ; and there is apt to be difference of view in the same States at different times; and at the same time a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a state income tax which is otherwise unobjectionable."

In *Freeman* v. *Hewit*, *supra*, upon which the majority opinion herein is solely grounded, this Court admonished that:

"* * * especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."
(329 U. S. at p. 252)

Further, in the *Freeman* v. *Hewit* case, *supra*, this Court recognized the vitality of *U. S. Glue Co.* v. *Oak Creek* and *Atlantic Coast Line* v. *Daughton*, *supra*, when it said:

"It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; cf. *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413."
(329 U. S. at p. 255)

Examining the "special facts" of the case herein, we believe the majority opinion does violence to the principle of *Freeman* v. *Hewit*, *supra*, upon which it relies solely. The fundamental error of the Indiana Supreme Court, in its majority opinion, is its assumption that the receipts herein taxed were gross proceeds from interstate sales. *There is no evidence in the record that gross proceeds from*

sales were used as the basis upon which the tax was imposed. Instead, the respondent admitted by stipulation that the income upon which the tax was imposed was voluntarily paid by him upon the receipt of "capital gains." The tabulation of income received by respondent in each year demonstrates, without doubt or contradiction, that it was *gain* rather than gross proceeds of sale upon which the respondent paid tax. (R. p. 16, l. 25 to p. 21, l. 8).

The important and controlling factual difference, therefore, between the *Freeman-Hewit* decision and the instant case, does not merely relate to the method of financing, as the majority opinion states. *The material difference between the two cases relates to the nature of the income taxed.* The *Freeman-Hewit* decision holds that a gross receipts tax upon each and every dollar received as the sales price is a direct burden on interstate commerce, for the reason that it affects each transaction in proportion to its magnitude, whether the sale results in a profit or loss; that such a tax could conceivably be sufficient to make the difference between profit and loss and could thereby impede, discourage or destroy interstate commerce.

In contrast, no tax attaches in the instant case unless *profits* are realized. The greatest factor from which a loss could be sustained in these transactions, namely, *the cost of acquisition, is allowed as a deduction.* The basis of the tax is the *gross difference* between the cost of the property upon acquisition by the taxpayer and the gross receipts from its sale. This clearly withdraws the tax base from that of gross receipts to that of gross *profits.* And, as stated in the *Daughton* case, *supra,* since the term "net income" does not have a rigid meaning, the State does have the right to assert what deductions may or may not be allowed in determining taxable *earnings;* the fact that

other deductions are not allowed does not render the instant tax any the less a net income or earnings tax.

Since the tax herein attaches only upon the receipt of *gain*, it could have no greater deterrent effect upon interstate commerce than the same tax upon respondent's receipt of dividends from the same stock, even though that stock be situated without the taxing state. The factors which justify the tax are: *First*, the receipts are gains,—which are more nearly income in the true sense of that term; *the tax alone cannot convert gain into loss*, as in the case of a tax on gross receipts; *second*, the recipient of those gains is a resident and domiciliary of Indiana, the taxing State. We respectfully urge that the receipts herein taxed are as equally real income, in the true sense of the term, as dividends or interest, the receipts of which are taxable to Indiana residents irrespective of the situs of the stocks or bonds from which such earnings are derived. (Indiana Acts of 1937, Chapter 117, Section 1 (m), as amended, Burns' Indiana Statutes, Section 64-2601 (m)).

Since the only transactions subject to the tax herein are those in which profits were realized, the tax is not a direct burden on interstate commerce, since no tax is due if the transaction results in a loss. We submit, therefore, that *Freeman* v. *Hewit*, *supra*, the sole authority upon which the majority opinion is grounded, is not applicable to the "special facts" herein and that the Indiana Supreme Court, in its majority opinion, has failed to recognize a material and controlling factual distinction between that case and this, thereby extending the application of the *Freeman-Hewit* decision far beyond that intended by this Court.

2. Since the tax in the instant case is upon gain, the question of whether the taxpayer is engaged in interstate commerce should not be material. However, we believe the Indiana Supreme Court has extended the meaning of inter-

state commerce, for tax purposes, beyond that intended by the Commerce Clause as interpreted by this Court in the *Freeman-Hewit* case. In that case, this Court likened the stock certificates to the machines in *Adams Mfg. Co.* v. *Storen* (1938) 304 U. S. 307; 58 S. Ct. 913; 117 A. L. R. 429; 82 L. Ed. 1365, holding that it was no less interstate commerce because the property sold *and transmitted across state lines* was stock certificates rather than tangible personal property.

In the instant case, there is no evidence that respondent ever possessed or owned specific, identifiable shares of stock. It was stipulated that:

> "The stock certificates were never ordered out or transferred to the claim of the claimant. Neither were they ever delivered to the claimant in a street name. But the property interest in the stock was maintained in what is commonly called a margin account."
> (R. p. 21, ll. 14-19)

In this case, clearly the respondent is not shown to have transmitted stock certificates possessed by him across state lines as in *Freeman* v. *Hewit*. *There is no showing herein that the delivery of the stock sold necessitated the crossing of state lines.* Who can say with certainty that the shares sold by respondent crossed state lines? Is it not just as logical to assume that the purchasers resided in the same state in which the securities were held, at least in many instances?

On this point we refer the Court to *Ware & Leland* v. *Mobile County*, (1908) 209 U. S. 405; 28 S. Ct. 526; 52 L. Ed. 855, as being most similar to the instant case except that it concerned the selling of cotton future contracts on margin. In that case this Court emphasized that there was no contract for nor actual delivery of cotton; that no specific cotton was contemplated; that if delivery were required, it

could be acquired and delivered in one and the same state. In that case, this court upheld a state license tax on the broker engaged in multistate activities because there was not necessarily any movement of commodities in interstate traffic. If such a broker is not engaged in interstate commerce, the activities of the customer would seem to be one step further removed. The customer's activities are those of local communication with a local broker. The transmission of securities across state lines as in *Freeman-Hewit* is an essential element lacking from the fact pattern herein.

In *Western Livestock* v. *Bureau* (1938) 303 U. S. 250, at p. 253; 58 S. Ct. 546; 115 A.L.R. 944; 82 L. Ed. 823, this Court said:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, *unless performance is within its protection*, is a proposition no longer open to question." (Emphasis supplied)

We do not overlook the fact that marginal transactions are subject to Federal regulation, primarily, we believe, to prevent the excessive use of credit. However, in striking the balance between Federal and State power, this Court has recognized that Federal regulation does not in all cases preclude the right of a State to tax. Nor does such regulation in all cases determine that activities of individuals so regulated are interstate rather than local for tax purposes. Examples of this are found in the coverage of the Federal Wage and Hour Law which includes many individuals performing local activities in so far as state taxation is concerned. With respect to marginal transactions, the Federal regulation is directed to the level of the securities exchanges and only indirectly upon the customer. In this case, since performance in interstate commerce was not shown to have

been required of respondent, we submit that his activities are no more interstate than those of an individual dealing with a local, federally regulated bank. We believe that this reasoning is in accord with *Freeman* v. *Hewit* wherein the taxpayer was held to have been engaged in interstate commerce apparently because of the interstate shipment of his wholly owned securities, rather than for the reason that he was dealing with a federally-regulated broker.

Conclusion

This case presents still another phase of the Indiana Gross Income Tax Act of 1933, as amended,—in our opinion unlike the *Adams, Freeman-Hewit* or any other cases decided under that Act. Long before *Freeman-Hewit,* in fact, since July 1, 1934, income from marginal transactions has been taxed on a gross earnings as distinguished from a gross receipts basis. For years, other classes of taxpayers have by statute been accorded the gross earnings basis. Throughout the years, the Indiana General Assembly has extended the gross earnings basis to numerous classes of taxpayers, both before and since *Freeman-Hewit,* such amendments often having been sponsored by the class affected. Until this case, no one has seriously believed that such a tax violated the Commerce Clause.

This basis is believed to be justified by the fact that the activities of such classes of taxpayers result in a very narrow margin of profit, over which the taxpayer in many instances has no control. For example, dealers in securities are limited in their income producing possibilities by the fact that the market fluctuates from day to day, in some instances, only a fraction of a point. Certain of such taxpayers by various regulatory measures, Federal and State, are limited in the amount of interest or other income which they may charge. Others are limited to a specific margin

fixed by certain regulatory bodies over which such taxpayer has no control. The classes of taxpayers accorded the gross earnings basis do not have that free rein of other taxpayers to enter into a competitive field without restriction, who have only the law of supply and demand by which to fix their selling prices, which, in some instances, may reflect a profit varying from forty to one hundred percent of the cost of the merchandise sold. *Also taxpayers accorded the gross earnings basis often do not receive, control nor have the right to control the entire gross proceeds of the transaction as in this case;* in other words, that which they receive is gain rather than gross proceeds. It is for the above reasons that the Act defines gross income in many instances to mean gross earnings.

For instance, Section 3 (h) of the Act, Burns Indiana Statutes, Section 64-2603 (h) specifically accords the gross earnings basis to public terminal grain handlers, stating that "gross earnings shall be construed to mean the gross receipts from sales of such grain and soy beans, less the cost of grain and soy beans sold during such period, without any deduction of any other kind or character."

Section 3 (i) of the Act, Burns Indiana Statutes, Section 64-2603 (i) specifically accords the gross earnings basis to sales of grain when the federal government regulates both purchase and selling price, stating that the tax shall be equal to one percent (1%) of the *margin.*

Section 1 (n) of the Act, Burns Indiana Statutes, Section 64-2601 (n) accords the gross earnings basis to banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper, persons engaged in the business of lending money or credit, and that section was amended by the Indiana Acts of 1953, Chapter 200, p. 753 to now include investment companies regulated under the Federal Investment Company Act of 1940, as amended.

The decision of the Indiana Supreme Court, by its majority opinion, is, therefore, of more vital importance than the precise issue herein. The import of that decision is to invalidate the gross earnings basis of the tax with respect to all taxpayers so reporting, wherever interstate, extra-state or multistate elements are present.

If the dividends received by respondent from the same securities herein are subject to the tax, as the Indiana Act indicates, even though the securities may have been held outside Indiana, we believe that the gains herein are as equally real income, in the true sense of that term, and not subject to interstate commerce immunity.

WHEREFORE, your petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, that a review of the case herein be made by this Honorable Court, and that the majority opinion, decision and judgment of the Indiana Supreme Court be in all things reversed, and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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Indianapolis, Indiana.

APPENDIX "A"

The majority opinion of the Indiana Supreme Court as pronounced by FLANAGAN, J., on December 15, 1953, and reported unofficially in 116 N. E. (2d) 104, is as follows:

FLANAGAN, J.:

"In the case of *Freeman v. Hewit* (1947), 329 U. S. 249; 67 S. Ct. 274; 91 L. Ed. 265, the Supreme Court of the United States decided that an Indiana citizen who bought stock on the New York Stock Exchange was engaged in interstate commerce, and therefore was not subject to tax on those transactions under the Gross Income Tax Law of the State of Indiana. In that case the Indiana citizen actually bought and paid for the stock.

"The question here presented is whether that decision governs buying on margin.

"The factual difference, as we understand it, is that when stock is bought on margin the broker advances a percentage of the purchase price, holds a lien on the stock for his advancement, and does not permit the stock certificate to be put in the name of the customer unless the customer pays in full, which rarely happens.

"This factual difference merely relates to the method of financing.

"However, the State of Indiana contends that transactions of this kind are only matters of bookkeeping; that since the stock certificates themselves do not cross state lines, no question of interstate commerce is involved.

"We cannot agree. Importance cannot attach to whether a piece of paper goes over state boundaries. Importance must attach to whether the *transaction itself* was a part of interstate commerce.

"As the Supreme Court of the United States pointed out in the case of *Freeman* v. *Hewit, supra*, the vital question in each case is whether the *sale itself* was in the field of inter-state commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference.

"The trial court held that the facts in this case bring it within the rule laid down in the *Freeman* case. We think the trial court was correct.

"Judgment affirmed."

EMMERT, J. dissents with an opinion; DRAPER, C. J. concurs in dissent.

APPENDIX "B"

The dissenting opinion as pronounced by Emmert, J., and in which Draper, C. J., concurred on December 15, 1953, reported unofficially in 116 N. E. (2d) 104, at 105, is as follows:

EMMERT, *J.*:

"The net effect of the majority opinion is a decision that a net income tax assessed against a resident of Indiana upon his capital gains realized from sales of common stock on the New York Stock Exchange, when the certificates remained in New York, violates the Commerce Clause of the Federal Constitution. This contravenes the ruling precedents of the Supreme Court of the United States, which are binding on this court, on the right of the states to impose taxes which are not in violation of the Commerce Clause.

The appellee, hereafter referred to as the taxpayer, was a resident of and domiciled in Indiana and in the years 1944, 1945 and 1946, through two brokerage firms who had branch offices in Indiana, bought and sold corporate stocks on the New York Stock Exchange. The stocks here involved were bought and sold on a margin account, the certificates being taken in a street name, and held by the brokers in New York as agents for the plaintiff. The certificates were pledged to the brokers as security for any indebtedness that might be owing from the taxpayer to his brokers. Under the stipulation made in the trial court by the appellant, hereinafter referred to as Indiana, and the taxpayer, the differ-

ence between the sale price, and the purchase price paid by the taxpayer at the time of acquisition, resulted in a gain in each transaction in the total sums as follows:

Years	*Numbers of sales*	*Shares Sold*	*Gains*
1944	32	3,310	$ 8,839.74
1945	31	3,200	14,699.82
1946	13	1,250	7,425.44

No losses sustained by the taxpayer from the sale of any corporate stock were deducted from these gains. The taxpayer allocated his $1,000 deduction under Section 64-2605 (b), Burns' 1951 Replacement, to other transactions, and asserted in the trial court he was entitled to a refund for taxes paid as follows:

1944 claimed refund	$ 88.39
1945 claimed refund	146.99
1946 claimed refund	76.63
Total claimed refund	$311.51

We are not concerned in this appeal with the validity of Regulation 1005 since the taxpayer paid the taxes in dispute under the assumption that it applied to him, and Indiana asserts that this regulation furnishes the basis for computing the taxes owed for the respective years.

We should not let the decision in this case be influenced by the name given the Act by the General Assembly.[1]

"In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 177; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435."

Nelson v. *Sears, Roebuck & Co.* (1941), 312 U. S. 359, 363; 61 S. Ct. 586; 85 L. Ed. 888; 132 A.L.R. 475.[2]

In considering the validity of the various provisions of the Indiana Act, the Supreme Court of the United States has held that the provisions then before it substantially imposed a tax on gross receipts, and was therefore analogous to a sales tax.

Adams Mfg. Co. v. *Storen* (1938, 304 U. S. 307, 311, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429;
Harvester Co. v. *Dept. of Treasury* (1944), 322 U. S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313;
Freeman v. *Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

However, under the law and the facts in this appeal the tax asserted by Indiana is not a gross receipts tax under any possible definition of the term. It is a tax upon the capital gain in each transaction, with no deduction permitted for transactions in which the taxpayer may have sustained a capital loss by sale of corporate stock at less than the purchase price. Therefore the decisions in

Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307, 311; 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, *supra.*

and

Freeman v. *Hewit* (1946), 329 U. S. 249; 67 S. Ct. 274; 91 L. Ed. 265, *supra.*

establish no basis for holding the taxpayer immune from the Indiana tax on his capital gains.

In substance, Indiana has sought to impose a net income tax on the capital gains transactions realized on a margin stock account, by an Indiana resident domiciled in this state. The fact that from an accounting standpoint the taxpayer had other costs in the transactions which he may not deduct for the purpose of computing the tax, does not make the tax any the less a net income tax. It could hardly be contended that Sec. 23 (h) of Ch. 1 of the U. S. Internal Revenue Code, 26 U.S.C.A., Sec. 23 (h), which provides

that, "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions", makes the Act a tax on gross receipts. See also Sec. 117 (d) of Ch. 1 of the U. S. Internal Revenue Code, 26 U. S. C. A. Sec. 117 (d).[2]

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the State are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

U. S. Glue Co. v. *Oak Creek* (1918), 247 U. S. 321, 328, 329; 38 S. Ct. 499; 62 L. Ed. 1135.

The Indiana tax in controversy here violates neither the Commerce Clause nor the Fourteenth Amendment of the Federal Constitution.

The judgment of the trial court should be reversed.

DRAPER, C. J., concurs in this opinion.

NOTES:

(1) "This act may be cited as the Gross Income Tax Act of 1933." Section 64-2601, Burns' 1951 Replacement.

(2) "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.* 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon gross receipts from an interstate sale.' Lockhard, Gross Receipts Taxes on Interstate Transportation and Communications, 57 Harv. L. Rev. 40, 87." Harvester Co. v. Dept. of Treasury (1944), 322 U. S. 340, 346; 64 S. Ct. 1019, 88 L. Ed. 1313.

(3)(1) "In the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges.

(2) "In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, 'net income' as used in this paragraph shall be read as 'adjusted gross income'. Section 117(d), Ch. 1, U. S. Internal Revenue Code, 26 U. S. C. A. Sec. 117 (d)."

APPENDIX "C"

Pertinent provisions of the Indiana Gross Income Tax Act bearing on issues presented herein, are as follows:

Section 3(f):

> "With respect to that part of the gross income of every person received from operating any bank, trust company, building and loan association, insurance and/or casualty company, finance company, small loan company, or any other business of a similar nature, in-

cluding all others mentioned in subsection (n) of section 1 (Sec. 64-2601), the tax shall be equal to one (1%) percent of such part of the gross income."

(Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117. Sec. 3, p. 604; 1941, ch. 140, Sec. 2, p. 418; 1945, ch. 310, Sec. 1, p. 1380.)

Burns' Indiana Statutes Anno. Sec. 64-2603.

Section 1(n):

"In the case of banks, trust companies, building and loan associations, investment companies, regulated under the federal investment company act of 1940 as amended, brokers, dealers in securities, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit the term 'gross income' shall be deemed to mean gross earnings, but only in respect to that part of the total gross income of such persons which is derived from the businesses and activities enumerated in this subsection."

(Acts 1933, ch. 50, Sec. 1, p. 388; 1937, ch. 117, Sec. 1, p. 604; 1941, ch. 140, Sec. 1, p. 418; 1943, ch. 144, Sec. 1, p. 425; 1945, ch. 143, Sec. 1, p. 311; 1947, ch. 370, Sec. 1, p. 1471; 1953, ch. 200, Sec. 1, p. 747.)

Burns' Indiana Statutes Anno. Section 64-2601.

Section 3 (h):

"With respect to that part of the income of every person which is derived solely from the purchase and sale of whole grain and soy beans by such person in the capacity of a public terminal grain handler engaged in the business of receiving, processing, storing, and merchandising whole grain and soy beans in markets having full transit privileges, the tax shall be equal to one (1%) per cent of the gross earnings, computed upon an annual basis, derived from such sales of grain and soy beans. Provided, however, that for the purpose of this subsection only, gross earnings shall be construed to mean the gross receipts from sales of

such grain and soy beans less the cost of grain and soy beans sold during such period, without any deductions of any other kind or character. Provided, further, that nothing herein contained shall be construed to authorize the computation of the tax due under this act, measured by gross receipts of such persons from storage, cleaning, service or handling charges, or any other receipts except those from sales of whole grain and soy beans on a gross earnings basis."

(Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117, Sec. 3, p. 604; 1941, ch. 140, Sec. 2, p. 418; 1945, ch. 310, Sec. 1, p. 1380.)

Burns' Indiana Statutes Anno., Section 64-2603.

Section 3 (i):

"With respect to that part of the income of every person which is derived solely from the purchase and sale of whole grain and/or soy beans when the United States government, by any authorized officers, department of (or) agency, has by any law, rule, regulation or directive, prescribed both a purchase-price and a sale price thereby creating a specific margin between such purchase-price and such sale price, the tax shall be equal to 1% of such specific margin."

(Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117, Sec. 3, p. 604; 1941, ch. 140, Sec. 2, 418; 1945, ch. 310, Sec. 1, p. 1380.)

Burns' Indiana Statutes Anno., Section 64-2603.

Section 1 (m):

"* * * Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the state of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the state of Indiana, or from activities incident thereto (including the disposal of

capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of 'gross income' any receipt of a taxpayer received as interest or dividends, or from sales or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal remuneration of any kind or character received by any taxpayer."

(Acts 1933, ch. 50, Sec. 1, p. 388; 1937, ch. 117, Sec. 1, p. 604; 1941, ch. 140, Sec. 1, p. 418; 1943, ch. 144, Sec. 1, p. 425; 1945, ch. 143, Sec. 1, p. 311; 1947, ch. 370, Sec. 1, p. 1471; 1953, ch. 200, Sec. 1, p. 747.)

Burns' Indiana Statutes Anno. Section 64-2601.

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HAROLD B. WILLEY

Supreme Court Of The United States

OCTOBER TERM, 1954

No. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, *Petitioner,*

v.

MARK E. NEBEKER, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE PETITIONER

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Supreme Court Of The United States

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No. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA,
Petitioner,

v.

MARK E. NEBEKER,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE PETITIONER

REFERENCE TO OPINIONS BELOW

The majority opinion, decision and judgment of the Indiana Supreme Court (R., pp. 27, 28) and the dissenting opinion of EMMERT, J., in which DRAPER, C. J. concurred (R., pp. 28-32), as yet unreported officially, are unofficially reported in 116 N. E. (2d) 104 and 105, respectively, of the West Reporter System.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The issue of alleged interstate commerce immunity as applied to the receipt of respondent's capital gains herein was raised in the Court of first instance in the Vermillion Circuit Court of Vermillion County, Indiana, by the filing of respondent's second amended complaint on October 1, 1951 (numerical paragraph 16 thereof.) (R., pp. 14-19). Said complaint is based solely upon the allegation of interstate commerce immunity. This cause was put at issue in the trial court by the filing of petitioner's answer of denial. (R., p. 20).

Upon the admission and conclusion of evidence, and submission of the cause, the Court of first instance entered its general finding that the allegations of respondent's complaint were true and judgment for respondent that the income herein was immune from taxation by virtue of the Commerce Clause. (R., p. 25).

The question of alleged interstate commerce immunity was pursued by petitioner from the Court of first instance by the filing of petitioner's Motion for New Trial. (R., pp. 25, 26), which was overruled by said Court. (R., p. 26). Thereafter, the question of alleged interstate commerce immunity was submitted to the Indiana Supreme Court by the filing of the Transcript of the Record, together with petitioner's Assignment of Errors. (R., p. 1). After briefing and argument, the Indiana Supreme Court, on December 15, 1953, by a divided Court, entered its written opinion, decision and judgment, based solely on the ques-

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tion of interstate commerce immunity, in which said majority opinion it concluded as follows:

> "* * * As the Supreme Court of the United States pointed out in the case of *Freeman v. Hewit, supra,* the vital question in each case is whether the *sale itself* was in the field of interstate commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference.
>
> "The trial court held that the facts in this case bring it within the rule laid down in the *Freeman Case.* We think the trial court was correct.
>
> "Judgment affirmed." (R., p. 28) (116 N. E. (2d) at p. 105.)

EMMERT, J. dissented with an opinion; DRAPER, C. J. concurred in dissent. (R., pp. 28-32) (116 N. E. (2d) pp. 105-107).

Thereafter, on January 4, 1954, and within the time allowed by the Rules of the Supreme Court of Indiana, the petitioner herein filed its Petition for Rehearing (R., p. 32), which was denied by the Indiana Supreme Court on January 27, 1954, (R., p. 34), EMMERT, J. and DRAPER, C. J. dissenting. The opinion, decision and judgment of the Indiana Supreme Court was rendered by the highest Court of the State of Indiana from which a decision could be had and is a final judgment, subject to no further review or correction in any other tribunal of the State of Indiana.

Petition for Writ of Certiorari and Transcript of Record were filed in this Court on April 27, 1954 as No. 731, October Term 1953, and granted on October 14, 1954. (R., p. 37).

The issue in this case and the holding of said Court, of which reversal is sought by this Honorable Court, draws

in question the validity of a state statute and regulations thereunder on the grounds of being repugnant to the United States Constitution, viz.: The Commerce Clause, Article I, Section 8, Clause 3.

The statutory provisions believed to sustain the jurisdiction of this Honorable Court are: Section 1257 (3) and Section 2101 (c) of Title 28 of the U. S. Code Annotated.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional and statutory provisions and regulations involved are as follows:

Article I, Section 8, Clause 3 of the United States Constitution, which reads as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *".
> U. S. C. A., Constitution, containing Article I, Section 1 to Article I, Section 9, p. 200.

The statute involved is the Indiana Gross Income Tax Act of 1933, as amended, (Indiana Acts of 1933, Ch. 50; Indiana Acts of 1937, Ch. 117, and succeeding amendatory acts), which may be found complete with amendments to date in Burns' Indiana Statutes Anno., (1951 Replacement) Vol. 11, Part 2, Section 64-2601 to Sec. 64-2635, both inclusive. Pertinent provisions of said act are reproduced herein as Appendix "A" of this brief.

The regulations of petitioner especially pertinent to the precise issue herein and under which the tax was paid, as last promulgated on April 27, 1946, are as follows:

> "REGULATION 2805: MARGINAL TRANSACTIONS. Any taxpayer dealing on margin will

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report his gross earnings from such transactions. Gross earnings in such cases will be the gross profits realized, whether received or credited to his account, where securities or commodities are sold for any amount in excess of cost, without any deductions for losses incurred when securities or commodities are sold for an amount less than cost, and also without any deductions for taxes, brokerage commissions or other expenses incident to the transaction."

"REGULATION 1005: GROSS EARNINGS MEANS GENERALLY the gross profits on individual transactions before costs of effecting the transactions are deducted, and with reference to sales of property such gross earnings means and includes only the gross difference between the cost of such property, as of the date of its final acquisition by the taxpayer, and the *gross* receipts resulting from the sale of such property. It also includes gross commissions, interest, dividends, fees, etc. In computing "gross earnings" no deductions can be taken for losses on any transactions. "Gross Earnings" is stipulated as being the "Gross Income" for taxation of banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit. (Sec. 1n; Sec. 1p.)"

The foregoing regulations in substance are the same as the corresponding regulations which have been in effect since July 1, 1934, excepting only minor variations in wording and identified by different numbers.

THE QUESTIONS PRESENTED

I

Does interstate commerce immunity extend to the taxation of capital *gains* derived from marginal stock trans-

actions, such gain consisting of the gross *difference* between the cost of the property upon acquisition by the taxpayer and the gross receipts from its sale, with no deduction permitted for transactions in which the taxpayer may have sustained a loss by sale of corporate stock at less than the purchase price, the recipient of such gains being a resident of the State seeking to tax?

II

Are capital gains from marginal stock transactions derived from interstate commerce when there is no evidence that the recipient of such gains ever owned specific, identifiable shares, or that any stock ever crossed state lines, or that such recipient ever performed any act in interstate commerce?

CONCISE STATEMENT OF THE CASE

This action, commenced in the Vermillion Circuit Court of Vermillion County, Indiana (47th Judicial Circuit of Indiana), and thereafter appealed to the Supreme Court of Indiana, is one to recover taxes imposed upon the receipt of capital *gains* by respondent, domiciled and residing in Indiana, derived from his marginal stock transactions.

The facts are embodied in two Stipulations of Facts entered of record in the trial court, and may be found in the record submitted herewith at pages 5 to 12, inclusive ("Stipulation of Facts") and Pages 22 and 23 (supplementary "Stipulation").

So much of the facts as are necessary for a complete understanding of the questions herein presented are as follows:

Respondent is a resident of Indiana (R., p. 9). During the years 1944, 1945 and 1946, respondent consummated

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certain stock transactions through the stock brokerage firms of Thompson and McKinnon and/or James E. Bennett and Company (R., pp. 9-11). In each of said transactions, the purchase of said stock was made by the broker, the stock credited to the account of respondent on the books of the broker and the cost thereof debited to the account of respondent on the books of the broker kept in the State of Indiana. The stock certificates were never ordered out or transferred to respondent, nor were they ever delivered to respondent in a street name, but the property interest in such stock was maintained in what is commonly called a margin account. (R., pp. 11, 12).

The respondent had the right to receive the dividends paid on such stock, the right to vote or direct the vote of such stock in stockholders' meetings, and the right to sell the same and receive the proceeds. The rights of ownership thereto are subject only to the terms of a pledge to the broker for the payment of any indebtedness which might be owing by respondent to the broker. (R., p. 12).

Upon orders of respondent, sales of such stock were made by the broker, who debited the stock sold to the account of the respondent, and the proceeds therefrom were credited to the respondent's account on the books of the broker kept in the State of Indiana. (R., p. 12). Such transactions and the gains derived therefrom were as follows:

Years	*Number of Sales*	*Shares Sold*	*Gains*
1944	32	3310	$ 8,839.74
1945	31	3200	14,699.82
1946	13	1250	7,425.44

(R., pp. 9-11).

For each of said years, respondent reported such *gains* in his tax returns as "capital gains without deductions or

losses (margin account)". (R., p. 6). The amount of tax paid on said "gains" and of which a refund is sought herein are as follows:

Year	*Amount Claimed as Refund*
1944	$ 88.39
1945	146.99
1946	74.23

(R., pp. 7, 8, 10, 11).

In addition to the tax herein involved, respondent paid intangibles tax to the State of Indiana on the securities herein, the liability for which is not in issue. (R., p. 23).

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SUMMARY OF ARGUMENT

I

Respondent, *a resident of Indiana,* was engaged through his Indiana broker in buying and selling corporate stock on the New York Stock Exchange by means of *margin accounts.* Securities bought by him (or those of like kind and value) were *held in New York* as security for that part of the purchase price advanced by the broker. Upon the aggregate *gains* from each sale in excess of cost, Indiana asserts the right to impose a tax of 1% upon such income. The *domicilary* state of the owner of property located in another state may constitutionally exact a tax upon *earnings* derived from such property. (*New York ex rel. Cohn v. Graves* (1937), 300 U. S. 308).

II

The principles of *Freeman v. Hewit* (1946), 329 U. S. 249, have here been applied erroneously to the taxability of income, materially different in *character* from that involved in said case. Rather than gross receipts, the *tax base* herein is the aggregate *gross earnings* arising from each transaction in which securities are sold for any amount *in excess of cost,* such earnings consisting of the *difference* between the cost of the securities upon acquisition by the taxpayer and the gross receipts from their sale, without deductions for transactions in which the taxpayer may have sustained a loss by sale of securities at less than the purchase price. (*Atlantic Coast Line v. Daughton* (1923), 262 U. S. 413, 422, footnote 6).

III

Because the tax levy is not a constant, fixed sum but is a *percentage* (1%) of *only that portion* of gross receipts

representing gross earnings, the tax alone cannot transform such gain into loss, as would be the case if the percentage were applied to the entire gross receipts from sale. (*United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321, 328, 329).

IV

Further, *marginal* stock transactions are substantially distinguishable from those in *Freeman v. Hewit* (1946), 329 U. S. 249. Marginal stock buying did *not* transfer either the ownership or possession of *specified, identifiable* securities to the respondent. Securities bought by the respondent (or those of like kind and value) were pledged to secure the broker's advancement and therefore *remained with the New York broker* until sold. (*Richardson v. Shaw* (1908), 209 U. S. 365, 374-376). Because the stock certificates remained with the New York broker, *interstate transmission of the certificates* (upon which Freeman-Hewit was grounded) *was lacking* from the instant fact pattern. The only interstate incidents herein, consisting of interstate communications between the New York and the Indiana broker, bear no greater weight in establishing these as interstate sales than if it were New York real estate which respondent was selling.

ARGUMENT

Domicil As The Basis Of An Earnings Tax

New York ex rel. Cohn v. Graves (1937), 300 U. S. 308; 57 S. Ct. 466; 108 A. L. R. 721; 81 L. Ed. 866, established that the State of New York could impose its net income tax upon income of New York residents received from rents of land located in New Jersey, and from interest on bonds held in New Jersey secured by mortgaged real estate in New Jersey. The principles of said case were founded upon the protection afforded by New York to the recipient of the income in his person, in his right to receive the income and his enjoyment of it when received, said rights and privileges attaching to domicil within the taxing state. Said tax was also upheld because it was one on net income, thereby being apportioned to the ability of the taxpayer to pay it.

In *Greenough v. Tax Assessors* (1947), 331 U. S. 486, 491; 67 S. Ct. 1400; 172 A. L. R. 329; 91 L. Ed. 1621, decided within six months after *Freeman v. Hewit* (1946), 329 U. S. 249, the principles enunciated in New York ex rel. Cohn v. Graves, were recognized as still being applicable, in the following language:

> "• • • The domiciliary state of the owner of tangibles permanently located in another state, however, may require its resident to contribute to the government under which he lives by an income tax in which the income from the out-of-state property is an item of the taxpayer's gross income. It is immaterial, in such a case, that the property producing the income is located in another state. *New York ex rel. Cohn v. Graves,* 300 U. S. 308." (331 U. S. at p. 491).

In the instant case, respondent, *a resident of Indiana,* was engaged through his Indiana broker in buying and selling corporate stock on the New York Stock Exchange by means of margin accounts. Securities so bought by him remained in New York to secure that portion of the purchase price advanced by the broker. Upon the aggregate *gains* from each sale in excess of cost, Indiana imposed a tax of 1%.

Although New York ex rel. Cohn v. Graves was decided upon a contended violation of the Fourteenth Amendment (an issue not here raised), rather than upon a contended violation of the commerce clause, that case also recognized that a tax by the domiciliary state on net income is not forbidden by the Commerce Clause, irrespective of the source of the income. (300 U. S. 308, 313, 314). Therefore, said case is authority for the proposition that neither the Fourteenth Amendment nor the Commerce Clause forbid the domicilary state from taxing net income derived from property located in another state. Indiana here asserts that its right to tax the gross earnings here in question is constitutionally no less than the right of New York to tax under the circumstances in New York ex rel. Cohn v. Graves. Further, the fact that the income-producing property is located without Indiana creates no greater constitutional inhibition than was present in said case.

The Nature of the Income Here Taxed

It is abundantly certain from the record in this case that gross receipts from sale were not the basis upon which the tax was imposed. *In no instance herein does Indiana assert the right to tax the entire gross receipts from sale. No part* of the gross receipts from those transactions in which the taxpayer sold securities *for less than their initial cost to*

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him entered into the picture. From those transactions in which securities were sold for any amount *in excess of their cost to the taxpayer, only that part* of such gross receipts equivalent to the *gross excess* of the selling price above the cost was subject to the tax herein. That it was gross gains which were reported and upon which the tax was paid is evidenced from an examination of the record (pp. 9, 10 and 11), in which only those transactions from which gains were derived are shown, and which indicates *gains* ranging from $7.30 per one hundred shares of Johns-Manville stock sold on November 22, 1944 to $2489.49 per one hundred shares of Celanese Corporation stock sold on December 19, 1945. The stipulation admits that the income taxed herein consisted of *gains rather than gross receipts from sale.* (R., pp. 5-12).

The Nature of the Income in Freeman v. Hewit Distinguished

In pursuance of the statute which requires that a claimant state in his claim for refund the reasons for such claim, the respondent filed his claim for refund in which the reasons alleged by him at that time were solely as follows:

> "The reasons why Claim for Refund should be allowed, are as follows (explain fully):
>
> "Establishment of the non-taxibility of sales of securities executed outside of the state of Indiana by decision of the United States Supreme Court in the case of Freeman Trustee v. Hewit.
>
> "The above amounts were reported and paid on sales of securities without the state of Indiana.
>
> (Signature) Mark E. Nebeker."
>
> (R., p. 8).

In respondent's complaint filed in the lower court, the sole theory of recovery, as alleged in numerical paragraph

sixteen (16) thereof, was that the tax was imposed upon gross receipts from business conducted in commerce between the State of Indiana, the State of New York or other States of the United States, and that such tax was an illegal burden upon commerce between the State of Indiana and other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States, and that the State of Indiana was prohibited from taxing such gross income under the Gross Income Tax Law of 1933, and laws amendatory thereof and supplemental thereto. (R., pp. 18, 19)

The majority opinion of the Indiana Supreme Court relied solely upon *Freeman v. Hewit* (1946), 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, and concluded:

> "The trial court held that the facts in this case bring it within the rule laid down in the *Freeman case.* We think the trial court was correct." (R., pp. 27, 28).

Respondent's theory of recovery and the decision of the Indiana Supreme Court by its majority, having been bottomed upon the Freeman-Hewit decision, we respectfully submit that the special facts herein remove that case as a conclusive authority to determine the taxability of the *gross earnings* herein. In the instant case, during the three years involved, the respondent sold 7760 shares of stock, all at prices exceeding their cost to the respondent. From the sale of such 7760 shares, in all of which gross earnings arose, the total *gains* derived thereby were approximately $30,000.00 and the tax imposed thereon and paid by respondent was approximately $300.00 (R., pp. 8-11).

As illustrative of the substantial difference between this case and the Freeman-Hewit case, imagine what the tax at the same rate (1%) might have been if the tax had been

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imposed upon aggregate sales prices, not only of the 7760 shares sold at a gross profit, but also including such shares as may have been sold at a loss. Such was the situation in Freeman-Hewit, in which this Court condemned a tax at 1% upon the aggregate of all gross sale prices from sales of securities totaling $65,000.00, irrespective of whether the transactions were profitable or otherwise. The record herein does not indicate whether there were transactions in which the respondent suffered a loss, but it is clear that the gross receipts from such transactions, if any there be, were not included in the tax base. The record is clear not only that the 7760 shares reported were sold at prices in excess of cost, but also that the $30,000.00 reported and upon which tax was paid was gain rather than gross receipts from sale.

Petitioner therefore asserts that there is a manifest, substantial, and controlling difference between this case and Freeman-Hewit.

The Effect of the Tax Herein

As heretofore stated, only those transactions in which the selling price exceeds the cost give rise to any tax liability. In such transactions, gross receipts from sale are not the tax base, but only a necessary factor in determining the extent of gross earnings. In computing gross earnings, the *acquisition cost* of the securities to the respondent, is *always deductible.* Thus, *the largest and most variable factor from which a loss could be sustained* in these transactions, *is allowed as a deduction.* Respondent also is accorded a $1,000.00 annual exemption in computing the amount of income subject to tax. (Indiana Acts 1937, Chapter 117, Section 5 (b), Burns' Indiana Statutes, Section 64-2605 (b). (R., pp. 10, 11). We do not profess that other

deductions are allowed. Regulation 2805 specifically provides that, other than costs of the securities upon acquisition, no other deductions are allowed whether for taxes, brokerage commissions or other expenses incident to the transaction. Therefore, we do not claim that the tax is imposed upon final net income remaining after the deduction of all conceivable expenses pertaining to the transaction. However, we do say that with respect to the transactions giving rise to such tax liability, *the tax alone cannot transform such gain into loss, as would be the case if the tax were imposed upon gross receipts from sale.*

The tax herein is a *percentage* of the gross earnings, having been imposed upon this type of income at the rate of 1% from 1933 to the present date, except for the period from July 1, 1949 to December 31, 1953, during which period Indiana imposed a surtax of ¼ of 1% for the payment of a Veterans' Bonus. (Indiana Acts of 1949, Ch. 277, Sec. 9, Burns' Ind. Stat. Anno. Sec. 59-1409) The Veterans' Bonus tax raised sufficient revenue for the payment of such Bonus and was terminated by Executive Order effective January 1, 1954. Except for the above surtax, now removed, the basic tax has been 1% upon this type of income for over twenty years. Since such tax is a *percentage* instead of a constant, fixed amount, and applicable only to gross earnings, we do not see how it is possible for the tax *alone* to transform those gains into losses.

Conceding that the tax herein is not precisely the same as that in *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; 38 S. Ct. 499; 62 L. Ed. 1135, we do, however, contend that the principles established in the United States Glue Co. case are more applicable herein than those stated in Freeman-Hewit.

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The decision in United States Glue Co. v. Oak Creek was based upon a "manifest and substantial" difference in effect between a tax measured by gross receipts and one measured by net income, it being stated that such difference afforded a convenient and workable basis for distinguishing a direct and immediate burden upon commerce from a burden which is only indirect and incidental. The United States Glue Co. case reiterates that a tax upon gross receipts affects each transaction in proportion to its magnitude, irrespective of whether it is profitable or not, and that such a tax may make the difference between profit and loss. Similar to the tax sustained in the United States Glue Co. case, the tax herein has not the same deterrent effect because no tax arises unless a gain is shown, and the tax cannot be heavy unless the profits are large. The operation of the tax in the instant case is such that it distributes the cost of government among those best able to bear that burden, which is the underlying principle upon which net income taxes are based.

Petitioner also submits as applicable to the issues herein the principles announced in *Atlantic Coast Line v. Daughton* (1923), 262 U. S. 413; 43 S. Ct. 620; 67 L. Ed. 1051, in which the main question was whether a North Carolina net income tax law violated the commerce clause *because it did not allow certain deductions.* The taxpayer there contended that the law violated the commerce clause because it did not allow as deductions certain items, such as interest on its indebtedness, the expense of leasing trackage from other railroad companies and the expense of renting joint facilities and locomotives. The method of determining net taxable income used by North Carolina reflected net taxable income in the amount of $437,769.52. By contrast, the method for determining net taxable income used by the

taxpayer there reflected a net loss of $254,290.22. This difference was attributable to the fact that the taxpayer had certain expenses which it sought to deduct from its operating revenue, which North Carolina did not allow as deductible items. This case recognized that that income tax was not imposed upon gross receipts from interstate commerce and further that the term "net income" is not one of rigid meaning; that what deductions are to be made from gross income to ascertain net income, are details largely a matter of governmental policy as to which various states differ in their views at different times and as to different classes of taxpayers. (262 U. S. 413, 422, ft. note 6).

Marginal Stock Transactions Distinguished From Freeman v. Hewit

In the case of Freeman v. Hewit, the stock certificates were held by the taxpayer *in Indiana* and, after notification by his broker that a purchaser had been found, said securities were brought to the Indiana broker and *transmitted to New York.* It was held that there was no material difference between an interstate sale of intangibles and an interstate sale of tangibles. The stock certificates were there compared to the machines in *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; 58 S. Ct. 913; 117 A. L. R. 429; 82 L. Ed. 1365, it being stated that it was no less interstate commerce because the property sold *and transmitted across state lines* was stock certificates rather than tangible personal property.

In contrast with Freeman v. Hewit, the buying and selling of corporate stock by means of margin accounts, is handled in a materially different manner. *Richardson v.*

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Shaw (1908), 209 U. S. 365, 374; 28 S. Ct. 512; 52 L. Ed. 835, explains in detail the operation of marginal stock transactions and the relation between the broker and the customer, as follows:

> "* * * There has been much discussion upon this subject in the courts of the Union. The leading case, and one most frequently cited and followed, is *Markham v. Jaudon*, 41 N. Y. 235, a case which was argued by eminent counsel and held over a term for consideration. The opinion in the case is by Chief Judge Hunt, afterwards Mr. Justice Hunt of this court. He summarized the conclusions of the court as follows:
>
> > "The broker undertakes and agrees:
> >
> > "1. At once to buy for the customer the stocks indicated;
> >
> > "2. To advance all the money required for the purchase beyond the ten per cent furnished by the customer;
> >
> > "3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer and not of the broker;
> >
> > "4. At all times to have in his name and under his control ready for delivery the shares purchased, or an equal amount of other shares of the same stock;
> >
> > "5. To deliver such shares to the customer when required by him, upon the receipt of advances and commissions accruing to the broker; or,

"6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract the customer undertakes:

"1. To pay a margin of ten per cent on the current market value of the shares;

"2. To keep good such margin according to the fluctuations of the market;

"3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.

"The position of the broker is twofold: Upon the order of the customer he purchases shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds, for the benefit of the purchaser, ninety per cent of the purchase money. Quite as clearly he does not in this act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser until a sale is made by the order of the purchaser or upon his own action. In thus holding or carrying he stands also upon a different ground from that of a broker or agent whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of the broker as such. In so doing he enters upon a new duty, obtains other rights, and is subject to additional responsibilities . . . In my judgment the contract between the parties to this action was in spirit and effect, if not technically and in form, a contract of pledge." (209 U. S. pp. 374-376).

The margin requirements at present are those as prescribed in Title 15, U.S.C.A., Section 78-(g). Unlike Freeman v. Hewit and as recognized by Richardson v. Shaw, the securities bought by the customer (or those of equal value and like kind) remain with the broker as security for the broker's advancement. Of importance, therefore, is the fact that the securities remain in the state of the mart so that interstate transmission of the same is not required of the customer to complete their sale.

In the instant case, the record is silent as to the respondent ever owning or possessing specific, identifiable shares of stock in Indiana. Respondent's complaint, numerical paragraph eleven (11) thereof (R., p. 17), alleges as follows:

> "• • • Plaintiff's ownership of said corporate stock was never transferred to plaintiff's name on the stock register of the various corporations, nor were the certificates representing and evidencing said corporate stock, bearing assignments in blank, in so-called "street names", delivered to plaintiff, but were at all times kept and possessed by plaintiff's brokers in the State of New York."

The stipulation stated:

> "• • • The stock certificates were never ordered out or transferred to the claim of the claimant. Neither were they ever delivered to the claimant in a "street name", but the property interest in the stock was maintained in what is commonly called a margin account." (R., pp. 11, 12).

Thus, *there is no showing that the respondent transmitted stock certificates across state lines to consummate these marginal transactions.* Instead, it is affirmatively

established that the securities were never delivered to respondent and that his property interest therein was maintained in what is commonly called a margin account.

The instant case is somewhat similar to *Ware & Leland v. Mobile County* (1908), 209 U. S. 405; 28 S. Ct. 526; 52 L. Ed. 855, which dealt with the selling of cotton future contracts on margin. That case emphasizes that there was no contract for nor any actual delivery of cotton; that no specific cotton was contemplated and that if delivery were required, the cotton could have been acquired and delivered in one and the same state. That case upheld a state license tax on the broker engaged in multistate activities because there was not necessarily any movement of commodities in interstate traffic. In that case, as in this, the customers' activities are those of local communication with a local broker. Clearly, the transmission of stock certificates across state lines, as in Freeman-Hewit, is a material element lacking from the fact pattern herein.

As stated in Western Livestock v. Bureau (1938), 303 U. S. 250, 253; 58 S. Ct. 546; 115 A. L. R. 944; 82 L. Ed. 823:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, *unless performance is within its protection*, is a proposition no longer open to question." (Emphasis supplied.)

The use of interstate communications to effect the transactions herein is of no greater importance than if the respondent were to have used such interstate communications to effect the sale of real estate owned by him and located in the State of New York.

Recognizing that marginal transactions are subject to federal regulation to prevent the excessive use of credit,

such regulation is directed to the level of the Securities Exchange and only indirectly upon the customer. However, we do not understand that the existence of federal regulation determines in all cases that the activities of individuals thereby affected are immune from state taxation unless the state tax conflicts with the paramount federal regulatory power. For example, the coverage of the Federal Wage and Hour Law is broad to protect many individuals performing local activities insofar as taxation is concerned. Since performance in interstate commerce was not shown to have been required of the respondent, his activities are similar to those of an individual dealing with a federally regulated bank, whether within or without the taxing state. Insofar as we are able to determine, in Freeman-Hewit, the taxpayer was held to have been engaged in interstate commerce because of the interstate shipment of his wholly owned securities, rather than for the reason that he was dealing with a federally regulated broker.

CONCLUSION

This case presents still another phase of the Indiana Gross Income Tax Act of 1933, as amended,—in our opinion unlike the *Adams, Freeman-Hewit* or any other cases decided under that Act. Long before Freeman-Hewit, in fact, since July 1, 1934, income from marginal transactions has been taxed on a gross earnings as distinguished from a gross receipts basis. For years, other classes of taxpayers have by statute been accorded the gross earnings basis. Throughout the years, the Indiana General Assembly has extended the gross earnings basis to numerous classes of taxpayers, both before and since *Freeman-Hewit*, such amendments often having been sponsored by the class affected.

This basis is believed to be justified by the fact that the activities of such classes of taxpayers result in a very narrow margin of profit, over which the taxpayer in many instances has no control. For example, dealers in securities are limited in their income-producing possibilities by the fact that the market fluctuates from day to day, in some instances, only a fraction of a point. Certain of such taxpayers by various regulatory measures, Federal and State, are limited in the amount of interest or other income which they may charge. Others are limited to a specific margin fixed by certain regulatory bodies over which such taxpayer has no control. The classes of taxpayers accorded the gross earnings basis do not have that free rein of other taxpayers to enter into a competitive field without restriction, who have only the law of supply and demand by which to fix their selling prices, which, in some instances, may reflect a profit varying from forty to one hundred percent of the cost of the merchandise sold. *Also taxpayers accorded the gross earnings basis often do not receive, control nor have*

the right to control the entire gross proceeds of the transaction as in this case; in other words, that which they receive is gain rather than gross proceeds. It is for the above reasons that the Act defines gross income in many instances to mean gross earnings.

For instance, Section 3(h) of the Act, Burns' Indiana Statutes, Section 64-2603(h) specifically accords the gross earnings basis to public terminal grain handlers stating that "gross earnings shall be construed to mean the gross receipts from sales of such grain and soy beans, less the cost of grain and soy beans sold during such period, without any deduction of any other kind or character."

Section 3 (i) of the Act, Burns' Indiana Statutes, Section 64-2603 (i) specifically accords the gross earnings basis to sales of grain when the federal government regulates both purchase and selling price, imposing the tax at one percent (1%) on the "specific margin between such purchase-price and such sale price * * *."

Section 1(n) of the Act, Burns' Indiana Statutes, Section 64-2601(n) accords the gross earnings basis to banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper, persons engaged in the business of lending money or credit, and that Section was amended by the Indiana Acts of 1953, Chapter 200, p. 753 to now include investment companies regulated under the Federal Investment Company Act of 1940, as amended.

The decision of the Indiana Supreme Court, by its majority opinion, is, therefore, of more vital importance than the precise issue herein. The import of that decision is to invalidate the gross earnings basis of the tax with re-

spect to all taxpayers so reporting, wherever interstate, extra-state or multistate elements are present.

If the dividends received by respondent from the same securities herein are subject to the tax, as the Indiana Act indicates, even though the securities may have been held outside Indiana, we believe that the gains herein are as equally real income, in the true sense of that term, and not subject to interstate commerce immunity.

WHEREFORE, your petitioner respectfully prays that the majority opinion, decision and judgment of the Indiana Supreme Court be in all things reversed, and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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APPENDIX "A"

Pertinent provisions of the Indiana Gross Income Tax Act bearing on issues presented herein, are as follows:

Section 1 (n):

> "In the case of banks, trust companies, building and loan associations, investment companies, regulated under the federal investment company act of 1940 as amended, brokers, dealers in securities, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit the term 'gross income' shall be deemed to mean gross earnings, but only in respect to that part of the total gross income of such persons which is derived from the businesses and activities enumerated in this subsection."
>
> (Acts 1933, ch. 50, Sec. 1, p. 388; 1937, ch. 117, Sec. 1, p. 604; 1941, ch. 140, Sec. 1, p. 418; 1943, ch. 144, Sec. 1, p. 425; 1945, ch. 143, Sec. 1, p. 311; 1947, ch. 370, Sec. 1, p. 1471; 1953, ch. 200, Sec. 1, p. 747.) Burns' Indiana Statutes Anno., Section 64-2601 (n). (1951 Repl.)

Section 3 (f):

> "With respect to that part of the gross income of every person received from operating any bank, trust company, building and loan association, insurance and/or casualty company, finance company, small loan company, or any other business of a similar nature, including all others mentioned in subsection (n) of section 1 (Sec. 64-2601), the tax shall be equal to one (1%) per cent of such part of the gross income."
>
> (Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117, Sec. 3, p. 604; 1941, ch. 140, Sec. 2, p. 418; 1945, ch. 310, Sec. 1, p. 1380.) Burns' Indiana Statutes Anno., Section 64-2603 (f). (1951 Repl.)

Section 3 (h):

"With respect to that part of the income of every person which is derived solely from the purchase and sale of whole grain and soy beans by such person in the capacity of a public terminal grain handler engaged in the business of receiving, processing, storing, and merchandising whole grain and soy beans in markets having full transit privileges, the tax shall be equal to one (1%) per cent of the gross earnings, computed upon an annual basis, derived from such sales of grain and soy beans, Provided, however, that for the purpose of this subsection only, gross earnings, shall be construed to mean the gross receipts from sales of such grain and soy beans less the cost of grain and soy beans sold during such period, without any deductions of any other kind or character. Provided, further, that nothing herein contained shall be construed to authorize the computation of the tax due under this act, measured by gross receipts of such persons from storage, cleaning, service or handling charges, or any other receipts except those from sales of whole grain and soy beans on a gross earnings basis."

(Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117, Sec. 3, p. 604; 1941, ch. 140, Sec. 2, p. 418; 1945, ch. 310, Sec. 1, p. 1380.) Burns' Indiana Statutes Anno., Section 64-2603 (h). (1951 Repl.)

Section 3 (i):

"With respect to that part of the income of every person which is derived solely from the purchase and sale of whole grain and/or soy beans when the United States government, by any authorized officers, department of (or) agency, has by any law, rule, regulation or directive, prescribed both a purchase-price and a sale price thereby creating a specific margin between such purchase-price and such

sale price, the tax shall be equal to 1% of such specific margin."

(Acts 1933, ch. 50, Sec. 3, p. 388; 1937, ch. 117, Sec. 3, p. 604; 1941, ch. 140, Sec. 2, p. 418; 1945, ch. 310, Sec. 1, p. 1380.)
Burns' Indiana Statutes Anno., Section 64-2603 (i). (1951 Repl.)

Section 5 (b):

"In computing the amount of tax imposed under the provisions of this act for any year, there shall be deducted from the gross income of any taxpayer not provided for in subsection (a), an amount of one thousand dollars ($1,000.00). Each such taxpayer who is taxable hereunder upon gross income for any fractional part of the tax year shall be entitled to a deduction of that part of one thousand ($1,000.00) dollars, which bears the same proportion to that amount which the period of time during which the taxpayer is subject to tax bears to an entire year. In computing such period of time, a fraction of a month shall be disregarded unless such fraction is more than a half a month, in which case it shall be taken as a whole month. Where quarterly returns are filed as provided in this act, a proportionate part of the deduction provided for in this subsection may be claimed and allowed on each quarterly return."

(Acts 1933, ch. 50, Sec. 5, p. 388; 1937, ch. 117, Sec. 5, p. 604.)
Burns' Indiana Statutes Anno., Section 64-2605 (b). (1951 Repl.)

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Supreme Court of the United States

OCTOBER TERM, 1953

NO. [redacted] 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, *Petitioner,*

vs.

MARK E. NEBEKER, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1953

NO. 731

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA, *Petitioner,*

vs.

MARK E. NEBEKER, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of Indiana (R. p. 27 to p. 28, l. 32, inclusive and R. p. 28, l. 33 to p. 32, l. 26), as yet unreported officially, are unofficially reported in 116 N. E. (2d) 104.

STATUTES AND REGULATIONS INVOLVED

A portion of pertinent statutes and regulations are set forth in the Petition at pp. 4 and 5. However, additional sections of the Indiana Gross Income Statute are necessary for a proper determination of this controversy.

Burns' Indiana Statutes Annotated, 1951 Replacement, Vol. 11, Part 2, Section 64-2601, sub-section (n) is as follows:

> "In case of banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper and persons engaged in the business of lending money for credit, the term 'gross income' shall be deemed to mean gross earnings, but only in respect to that part of the total gross income of such persons which is derived from the businesses and activities enumerated in this subsection."

And Section 64-2629 (same volume as above) which empowers the director of the Indiana Gross Income Tax Division to promulgate rules and regulations not inconsistent with the Act.

QUESTIONS PRESENTED

1.

Can the State of Indiana constitutionally tax the income of one of its citizens and residents arising from the sale of corporate securities on the New York Stock Exchange, the tax base being the selling price of the securities less the cost price, without any deductions being permitted for losses, or for brokerage fees and other incidental costs of doing business?

2.

Is a regulation promulgated by the Indiana Gross Income Tax Division permitting the deduction of the cost price of securities from the selling price in order to arrive at a tax base valid as to a private investor when the statute authorizes such a tax base only to brokers and dealers in securities?

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3.

Is a tax statute, or a regulation allegedly promulgated under such a statute, unconstitutional which permits persons dealing on margin to deduct cost of acquisition from sales price for arriving at a tax base, but does not afford the same right to persons who pay cash for securities?

4.

If the securities in question were located in New York City in the possession of a broker as a pledge for a loan, had they acquired a business situs outside the State of Indiana, and therefore were beyond the reach of petitioner for tax purposes?

STATEMENT

Respondent, a citizen and resident of the State of Indiana, and a private investor, during the years of 1944, 1945 and 1946 purchased and sold shares of corporate stock. All purchases and sales were handled through brokers maintaining Indiana offices, and were consummated through the New York Stock Exchange. In each instance the certificates of stock were not delivered to respondent in Indiana, but his brokers' books in the State of Indiana showed respondent's stock ownership. The securities actually, that is, the stock certificates, were held by respondent's brokers in New York City, in what is commonly called "street names." The practical effect of having stock in "street names" is that the broker at all times holds stock certificates to the amount of its customers' ownership in the various corporations, and is able to make delivery of the certificates on demand. During all this period respondent had all the attributes of ownership; that is, he could vote or designate the voting of his stock,

he received the dividends thereon, he could sell or pledge the stock, and had the right of possession on demand. During all this period the State of Indiana demanded, and respondent paid, an excise or intangible tax on these identical securities for the privilege of ownership, and its incidents. Petitioner levied, and respondent paid, in the years 1944, 1945 and 1946, a gross income tax of $311.51 thus sold, and provoked the present litigation by claiming refund of the tax so paid.

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ARGUMENT

Respondent feels that this case can be broken down logically for argument into four specifications.

1. This Case Has Already Been Decided By the Supreme Court of the United States.

The case of Freeman v. Hewit (1947), 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265, this court held that it was beyond the power of the State of Indiana to levy a gross income tax on a citizen and resident of the State of Indiana who sold corporate securities on the New York Stock Exchange. There is no distinctive fact in the present case that would distinguish it from the case already decided. The slight factual difference was simply that in the case of Freeman v. Hewit (supra) the taxpayer held the stock certificates in the State of Indiana, and mailed them to New York, while in the instant case the certificates of respondent were held in the State of New York.

The universal rule is that a stock certificate is not property, but merely the evidence of ownership, and that one may be a stockholder without ever having been issued a stock certificate.

Blodgett v. Silberman (1927), 277 U. S. 1, 72 L. ed. 749, 48 S. Ct. 410;

Kirkland v. Hotchkiss (1879), 100 U. S. 491, 25 L. ed. 558;

Greenough v. Tax Assessors (1946), 331 U. S. 486, 91 L. ed. 1691

(Concurring Opinion of Justice Frankfurter);

Butler v. Schoonover (1887), 114 Ind. 381;

Markle v. Burgess (1911), 176 Ind. 25;

Brumbaugh v. Mellinger (1918), 68 Ind. App. 410.

Nor is it true, as contended by Petitioner, that a tangible article must be physically shipped across state lines before interstate commerce is recognized. Radio, television, electricity, telephone and telegraph communications are recognized objects of interstate commerce and incident regulations, although intangible in nature.

> Dep't of Financial Institutions v. General Finance Corp. (1949), 227 Ind. 373;
> U. S. v. American Bond & Mortgage Co. (1929), 31 Fed. (2d) 448.

Further, the doctrine of mobilia sequuntur personam, although sometimes criticized as a fiction, is of universal application, and places the situs of intangibles at the domicile of the owner.

Petitioner would make much of the argument that a net income tax is involved, and not a gross income tax. This theory is evolved from the fact that a regulation has been issued by the Gross Income Tax Division which permits a taxpayer buying on margin to deduct cost of securities from the sales price, and Petitioner reasons that the regulation therefore escapes the forbidden territory of burdening interstate commerce by taxing a loss. But the regulation does not permit the deduction of brokerage fees and legitimate expenses connected with the transaction. It becomes apparent immediately, by close examination, that a transaction in interstate commerce yielding a small profit would become a loss when the tax is imposed, and certainly would become a loss which Petitioner would tax when the brokerage fees and incidental costs were taken into account, and that the taxpayer would be paying a tax on a loss.

Another reason why the tax imposed by Petitioner is not a net income tax is the fact that it is strictly a transaction

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tax. In other words, if an investor, such as Respondent, on the same date, and under identical situations, sells different stocks, some reflecting a profit after deducting cost of acquisition, and some reflecting a loss, he will be still taxed on those reflecting a profit, even though the sum total of the daily transactions shows a substantial loss. Such is not a net income tax as has been sustained as a reasonable burden on interstate commerce.

The authority for this proposition advanced by Petitioner is said to be the case of U. S. Glue Co. v. Oak Creek (1918), 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135. But a reading of this case discloses that a true net income tax of the State of Wisconsin was involved, authorizing not only the deduction of costs of acquisition, but also business expenses, so that there could not be in any event a tax without a profit. The court pointed out this very fact, in saying:

> "A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit or loss, or to so diminish the profit as to impede or discourage the conduct of commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever sources arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property, and if there is not discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons or corporations otherwise subject to the jurisdiction of the states are

not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."

Respondent submits that this case has already been decided by this court, and further, that the decision of the Supreme Court of Indiana was correct.

2. Regulation 2805 is Void

This regulation, promulgated by the Gross Income Tax Division, permits persons dealing in margin accounts to deduct the costs of securities from the selling price, without deductions for losses. Section 64-2629, Burns' Annotated Statutes, Vol. 11, 1951 Supplement, empowers the Director of Gross Income Tax to promulgate rules and regulations not inconsistent with the act. There is nothing in the act that would authorize such a regulation; as a matter of fact the regulation is contrary to the act itself. The only pertinent provision of the act is Section 64-2601, but it permits a gross earnings basis (deduction of cost from selling price) only to banks, trust companies, building and loan associations, brokers, dealers in securities, finance companies, dealers in commercial paper and persons engaged in the business of lending money for credit. Any attempt by the director to extend the scope of the statute by regulation to people in general, and the respondent, a private investor, would be void. Hence, there is no legal admeasurement of tax as to respondent's transactions in interstate commerce.

3. Regulation 2805 is Void As Discriminatory

This regulation purporting to permit persons dealing in margin accounts to deduct cost from selling price is an illegal discrimination under the 14th Amendment in that it creates a favored class in those who borrow money to

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purchase securities as against those who pay cash for securities. Legally there is no distinction between those who buy on margin and those who purchase outright. In either case, legal title is vested in the purchaser, but as to the margin buyer his stock is encumbered with a pledge. There seems to be no valid reason as to why a margin buyer should be favored. As a matter of fact there have been so many economic evils in the past with regard to margin buying that it would seem that if there was to be any discrimination it would be in favor of the cash buyer.

Hartford S. B. I. & Ins. Co. v. Harrison (1936), 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838.

4. Petitioner's Position Would Create a Business Situs in New York.

Petitioner has insisted that respondent was dealing on margin with respect to the securities here involved, meaning that respondent had borrowed money from his brokers to purchase the securities. Accepting this as true for the purpose of argument, then the stock certificates were held in New York as a pledge for advancements, with the brokers having the first right to collect the dividends, vote the stock as they desired, if not otherwise directed, and to sell the stock in case of respondent's default. Assuming these facts to be true, the stock would have acquired a business situs in the State of New York, and would have been beyond the reach of the State of Indiana.

First Bank Stock Corp. v. Minnesota (1936), 301 U. S. 234, 86 L. ed. 1061, 57 S. Ct. 677;
Miami Coal Co. v. Fox (1931), 203 Ind. 99.

CONCLUSION

In order to escape the effect of the opinion of the Honorable Court in the case of Freeman v. Hewit (supra) petitioner insists that a net income tax is here involved for the reason that under Regulation 2805 (supra) a marginal buyer of securities may deduct the cost of the securities from the selling price in order to determine if a taxable profit has been made. But the balance of the regulation providing that losses may not be deducted, and that brokerage commissions and other expenses connected with the transaction may not be deducted, makes it transparent that even under this regulation petitioner would levy a tax upon such transactions that resulted in a substantial loss to the taxpayer. So the tax that petitioner would impose is not a net income tax in any respect, and under the authority cited by petitioner, U. S. Glue Co. v. Oak Creek (supra) it falls far short of the requirements of this Court announced in the Glue Co. case in that the imposition of the tax could "make the difference between profit or loss, or to so diminish the profit as to impede or discourage the conduct of commerce."

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARK E. NEBEKER,
Counsel for Respondent.

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FILED
DEC 27 1954
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA,

Petitioner,

v.

MARK E. NEBEKER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENT'S BRIEF

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NO. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA,

Petitioner,

v.

MARK E. NEBEKER,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

Petitioner's brief adequately refers to the opinions below (116 N. E. 2d 104), the grounds on which the jurisdiction of this Court is invoked and the constitutional provisions involved. Inadequacies in petitioner's statement of the statutes and regulations involved, petitioner's statement of the questions presented for review and petitioner's statement of the case are hereinafter supplied.

SUPPLEMENTAL STATEMENT OF STATUTES AND REGULATIONS INVOLVED

In addition to the Commerce Clause of the Federal Constitution, petitioner's Regulations 2805 and 1005, set forth at pages 4 and 5 of petitioner's brief, and Sections 1(n), 3(f), 3(h), 3(i) and 5(b) of the Indiana Gross Income Tax Act, set forth in Appendix "A" at pages 27-29 of petitioner's brief, the following provisions of the Indiana Gross Income Tax Act and petitioner's Regulations are involved in the determination of the questions presented in this case, viz.:

The final two provisos of Section 1(m) of the Indiana Gross Income Tax Act of 1933, as amended, reading:

> "* * * Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of 'gross income' any receipts of a taxpayer received as interest or dividends, or from sales, or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal re-

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muneration of any kind or character received by any taxpayer." (Indiana Acts of 1933, Ch. 50, Sec. 1, as amended by Ch. 117 of the Indiana Acts of 1937, Sec. 1, as finally amended by Chapter 370 of the Indiana Acts of 1947, Sec. 1, Burns' Ind. Stats., Sec. 64-2601(m).)

Petitioner's Regulation 4100, Rule 4, reading:

"Rule 4. Receipts from Businesses Maintained and Operated Wholly Outside the State. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in a state other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.'" (Indiana Gross Income Tax Regulations 46, Series VII, Reg. 4100, Rule 4; Commerce Clearing House Indiana Tax Service P 10-103.)

Indiana statutes authorize the courts to take judicial notice of the official regulations promulgated by petitioner. Indiana Acts of 1945, Ch. 120, Sec. 11, Burns' Ind. Stats., Section 60-1511.

THE QUESTIONS PRESENTED

I

Do sales on the New York Stock Exchange of securities owned by an Indiana resident and held in margin stock brokerage accounts maintained by such Indiana resident with broker members of the New York Stock Exchange constitute sales in interstate commerce?

II

If the foregoing Question I is answered in the affirmative, does the Commerce Clause of the Federal Constitution prohibit the imposition of the Indiana gross receipts tax on the gross gains from such interstate sales of securities sold at a gross profit?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case summarizes the three brief stipulations containing the entire evidence on which the case was submitted to the trial court (stipulation in the administrative proceeding before petitioner, R., pp. 5-12; stipulations entered into in trial court, R., pp. 21-23). The gist of the stipulations is that respondent was engaged during the years 1944-1946 in carrying margin stock brokerage accounts with broker members of the New York Stock Exchange, from which accounts respondent made numerous sales of stocks at a gross profit (32 such sales in 1944, 31 such sales in 1945, and 13 such sales in 1946). The stipulations show principally that the certificates evidencing the stocks sold were held by the brokers in New York City and that records of the sales were kept in both the New York and Indiana offices of such brokers.

The stipulations fairly assumed that the manner in which margin stock brokerage accounts are handled is a matter of general knowledge well known to the courts and, accordingly, did not particularize the dealings and activities necessarily involved in the operation of such accounts. Brief reference to the relationship of the parties and their dealings and activities across state lines in carrying on such margin brokerage accounts is requisite to the proper presentation of respondent's argument.

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Respondent, the customer and the owner of the stocks, is an Indiana resident. The brokers have their principal offices in New York City, with branch offices in Indianapolis and Terre Haute. Whether acting in New York City or in Indianapolis or Terre Haute, the brokers are agents of respondent and as such agents carry out respondent's orders in the purchase and sale of stocks. When each margin account was initially established respondent delivered cash or stocks or both, through his broker agent in Indianapolis or Terre Haute, to his broker agent in New York City. Any additions made by respondent of money or stocks to such accounts would be transmitted in interstate commerce to New York City. Respondent therefore established each account by the transmission of money or stocks or both in interstate commerce. Thereafter each purchase and sale of stocks was made pursuant to respondent's orders. Each order to purchase and each order to sell was given by respondent in Indiana and transmitted in interstate commerce to the brokers' offices in New York City; and all memoranda of purchases and sales, all invoices and all other communications of intelligence in the handling of accounts were transmitted in interstate commerce between Indianapolis or Terre Haute and New York. When either account should be finally closed out the New York broker will remit the residue of money or stocks in the account in interstate commerce to respondent in Indiana.

All purchases and sales of stocks in such margin accounts are made on the New York Stock Exchange, the principal national securities market in the United States, engaged predominantly in the interstate sale and marketing of securities among investors and dealers residing in all of the states and throughout the world. The transac-

tions on such Exchange, and the entire operation of the Exchange, are deemed to be in the stream of interstate commerce and are subjected to regulation under the Securities Exchange Act pursuant to the power of Congress to regulate interstate commerce (Securities Exchange Act of 1934, 15 U.S.C. 78a-78jj).

SUMMARY OF ARGUMENT

Respondent is engaged in the interstate business of the operation of margin stock brokerage accounts on the New York Stock Exchange through the employment of brokers in New York City who have the custody of the certificates evidencing the stocks held in the accounts. Except for the local holding and delivery of the stock certificates in New York, the entire operation of the brokerage accounts, carried on by the continuous interchange of intelligence across state lines and the selling of stocks in a national exchange, constitutes interstate commerce. The local handling of the stock certificates in New York City does not convert such interstate business into local transactions.

United States v. South-Eastern Underwriters Assn. (1944), 322 U. S. 533;

Swift & Company v. United States (1905), 196 U. S. 375;

Stafford v. Wallace (1922), 258 U. S. 546;

International Text Book Co. v. Pigg (1910), 217 U. S. 91;

Freeman v. Hewit (1946), 329 U. S. 249;

Gross Income Tax Division v. Quick (1938), 226 Ind. 329, 78 N. E. 2d 871, cert. den. 335 U. S. 860;

Gross Income Tax Division v. Strauss (1938), 226 U. S. 338, 79 N. E. 2d 103, cert. den. 335 U. S. 860.

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The Indiana gross income tax, as imposed by petitioner's Regulation 2805 on the gross profits from sales of stocks held in margin accounts, is a gross earnings or gross profits tax, not a net income tax. Allowance of deduction for selling expenses and losses in other sales is essential to any determination of net income. The Indiana tax is imposed, on an individual transaction basis, on the gross profit represented by the difference between gross sales price and cost of the stock sold, without allowance for selling expenses or for losses in other transactions. It is a gross profits tax, not a net income tax.

Peck & Co. v. Lowe (1918), 247 U. S. 165;
United States Glue Co. v. Oak Creek (1918), 247 U. S. 321;
Shaffer v. Carter (1920), 252 U. S. 37;
Atlantic Coast Line v. Daughton (1923), 262 U. S. 413;
Gwin, White & Prince, Inc. v. Henneford (1939), 305 U. S. 434.

The imposition by Indiana of an unapportioned gross profits tax on the total gross profits derived from interstate sales of stocks from margin brokerage accounts is a direct burden on commerce, because it is imposed on gross profits, not net income, because it imposes a potential multiple tax burden on commerce and because it discriminates against commerce.

Phila. Steamship Co. v. Pennsylvania (1887), 122 U. S. 326;
Crew Levick Co. v. Commonwealth (1917), 245 U. S. 292;
Fisher's Blend Station, Inc. v. Tax Commission (1936), 297 U. S. 650;

Puget Sound Stevedoring Co. v. State Tax Commission (1937), 302 U. S. 90;
J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307;
Gwin, White & Prince, Inc. v. Henneford (1939), 305 U. S. 434;
McLeod v. J. E. Dilworth Company (1944), 322 U. S. 327;
Freeman v. Hewit (1946), 329 U. S. 249.

The Indiana tax is a direct burden on commerce, because it is a tax on gross profits. It imposes a potential multiple burden on commerce, because both New York State and New York City may impose the same tax imposed by Indiana. It is a discriminatory burden on commerce because (a) it is unapportioned and taxes the full gross profits from interstate business; (b) it imposes a potential multiple tax burden on commerce; (c) it specifically discriminates against the interstate business of operating margin brokerage accounts by the provisions of Section 3(h) of the Act, taxing gross earnings from sales transactions of public terminal grain handlers on an annual basis, allowing all losses to be deducted from gains; and (d) it further specifically discriminates against the interstate business of operating margin brokerage accounts by the provisions of Section 1(m) and Regulation 4100, Rule 4, totally exempting the receipts of all other taxpayers derived from the operation of a business carried on at an out-of-state business situs, but taxing the gross profits of a margin brokerage account established at a business situs outside Indiana.

To sustain the instant tax would potentially open the door to the imposition of new state gross receipts, gross earnings and gross profits taxes on the vast interstate com-

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merce of the country in margin and hedging transactions on the stock, grain and commodity exchanges, in addition to the wide-spread state net income taxes already imposed on such commerce. The Indiana tax is necessarily a gross tax, is an invalid burden on commerce and should be condemned as such. If Indiana wishes to impose a tax on income from interstate commerce, it should adopt a true net income tax.

ARGUMENT

I

SALES ON THE NEW YORK STOCK EXCHANGE OF STOCKS OWNED BY AN INDIANA RESIDENT FROM MARGIN STOCK BROKERAGE ACCOUNTS MAINTAINED WITH BROKER MEMBERS OF THE NEW YORK STOCK EXCHANGE CONSTITUTE SALES IN INTERSTATE COMMERCE

Respondent's Activities Are Predominately In Interstate Commerce

The stock brokerage accounts from which the receipts sought to be taxed arose were created by the transmission by respondent in Indiana to New York City brokers of money or securities in interstate commerce. The sales transactions were sales made by respondent, an Indiana resident, through his New York City agent brokers to other agent brokers in New York City or through them to purchasers located anywhere in the world. All of the intelligence which directed the management of respondent's margin accounts, including the sale of stocks, was transmitted in interstate commerce between Indiana and New York. Except for the retention in New York City of the stock certificates (the evidentiary papers of respondent's ownership of stock in many corporations incorporated and carrying on business in many states), the business, management, control and operation of respondent's margin accounts and the sale of stocks on such interstate stock exchange were carried on in interstate commerce. Any doubt as respects the interstate character of the business of such margin account operations was dispelled by the Court's decision in *United States v. South-Eastern*

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Underwriters Assn. (1944), 322 U. S. 533, holding that the business of insurance carried on across state lines constitutes interstate commerce and overruling the Court's earlier decision to the contrary in *Paul v. Virginia* (1869), 8 Wall 168.

Indistinguishable Insurance Business Is Interstate Commerce

The *South-Eastern Underwriters* decision destroyed the notion that by isolating a part of a vast interstate operation, such as looking at the making of a local contract of insurance, or, as in this case, the retention of the stock certificates in the brokers' hands in New York City, such interstate business could be characterized as intrastate. Speaking for the Court, Mr. Justice Black said:

> "One reason advanced for the rule in the Paul case has been that insurance policies 'are not commodities to be shipped or forwarded from one State to another.'* But both before and since Paul v. Virginia this Court has held that Congress can regulate traffic though it consist of intangibles.* Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called 'local' and what 'interstate,' a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. Wickard v. Filburn, 317 U. S. 111, 119, 120, 63 S. Ct. 82, 86, 87, 87 L. Ed. 122; Parker v. Brown, 317 U. S. 341, 360, 63 S. Ct. 307, 318, 87 L. Ed. 315. We may grant that a contract of in-

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* Footnotes omitted.

surance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. Hall v. Geiger-Jones Co., 242 U. S. 539, 557, 558, 37 S. Ct. 217, 223, 224, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce.* Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. Swift & Co. v. United States, 196 U. S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.*'" (322 U. S. 546-47)

and

"The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. Lottery Case (Champion v. Ames), 188 U. S. 321, 355, 23 S. Ct. 321, 326, 47 L. Ed. 492. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, Hoke v. United States, 227 U. S. 308, 320-323, 33 S. Ct. 281, 283, 284, 57 L. Ed. 523, 43 L. R. A., N. S., 906, Ann. Cas. 1913E, 905; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, United

* Footnotes omitted.

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States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510; to drive a stolen automobile from Iowa to South Dakota, Brooks v. United States, 267 U. S. 432, 436-439, 45 S. Ct. 345, 346, 347, 69 L. Ed. 699, 37 A. L. R. 1407. Diseased cattle ranging between Georgia and Florida are in commerce, Thornton v. United States, 271 U. S. 414, 425, 46 S. Ct. 585, 588, 70 L. Ed. 1013; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 11, 24 L. Ed. 708. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation; — activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines." (322 U. S. 549-50)

No difference of substance exists between respondent's business involving the sales of stocks from margin brokerage accounts on the New York Stock Exchange and the business of insurance conducted across state lines. Without any actual interstate delivery in either instance of the insurance policies or the stocks sold, both activities are

submerged in the overwhelming chain of events which constitutes interstate commerce

Congress Regulates Transactions On National Securities Markets Under the Commerce Power

Regulation of margin requirements provided for by Section 7 of the Securities Exchange Act of 1934 is founded principally on the power of Congress to regulate interstate commerce, as set forth in the preamble of Congressional findings, contained in Section 2 of the Act, that the regulation of securities transactions on exchanges is necessary in order to protect interstate commerce because such transactions are effected by means of the mails and instrumentalities in interstate commerce, constitute an important part of the current of interstate commerce, directly affect the financing of trade, industry and transportation in interstate commerce and directly affect and influence the volume of interstate commerce. Securities Exchange Act of 1934; 15 U. S. C. 78b.

Congress Regulates Transactions On National Livestock Markets Under the Commerce Power

Similarly, the operations at the national stockyards, to which livestock is sent for sale, without prior interstate negotiation of sale, and with local delivery at the stockyards of the livestock sold after a purchaser therefor has been found, have been subjected to regulation by Congress under the Commerce Clause, Packers and Stockyards Act of 1921, 7 U. S. C. 181-229; *Stafford v. Wallace* (1922), 258 U. S. 546, and have been held subject to the anti-trust laws

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enacted by Congress under its power to regulate commerce. *Swift & Company v. United States* (1905), 196 U. S. 375.

The Conduct of a Correspondence School Course Across State Lines Is Interstate Commerce

The conduct of a correspondence school course across state lines, involving continuous intercourse between the school in Pennsylvania and its scholars and agents in other states, by means of correspondence through the mails, and transportation of books, apparatus and papers used in the course of study, was held to constitute interstate commerce, immune from state regulation, in *International Text-Book Co. v. Pigg* (1910), 217 U. S. 91, and the correspondence school, a foreign corporation, was held entitled to sue in the Kansas courts, notwithstanding its failure to comply with the foreign corporation qualification requirements of the Kansas statutes, on a contract locally negotiated by the school's Kansas solicitor with a Kansas resident enrolling the Kansas resident in a course of instruction and providing a fee therefor.

Sales of Produce Shipped to Out-State Markets to Find a Buyer Are Interstate Sales

Sales of poultry and livestock shipped to established out-of-state markets by an Indiana seller for sale there after a buyer should be procured, and without prior sales negotiation, were held by the Indiana Supreme Court to constitute sales in interstate commerce and entitled to Commerce Clause immunity from the imposition of the Indiana gross receipts tax. *Gross Income Tax Division v. Quick* (1938), 226 Ind. 329, 78 N. E. 2d 871; *Gross Income Tax Division v. Strauss* (1938), 226 Ind. 338, 79 N. E. 2d 103.

This Court denied a petition for a writ of certiorari in those cases. 335 U. S. 860.

Stock Sales On the New York Stock Exchange Are in the Stream of Commerce and a Part of Commerce

Under the stream of commerce theory applied to national markets, as exemplified in such cases as *Swift & Company v. United States; Stafford v. Wallace; Gross Income Tax Division v. Quick* and *Gross Income Tax Division v. Strauss, supra,* the stocks in respondent's margin accounts maintained with the New York brokers were put into the stream of interstate commerce when such stocks were offered for sale on the New York Stock Exchange and the ensuing sales of such stock constituted sales in interstate commerce.

The Unsound Intrastate Theory of the Cotton Broker Cases Is Obsolete and Inapplicable

The decision in *Ware & Leland v. Mobile County* (1908), 209 U. S. 365, relied on by petitioner (Brief, p. 22), upheld, on the authority of *Paul v. Virginia, supra,* since overruled, the imposition on cotton brokers, with offices in Mobile, New Orleans, New York and Chicago, of a fixed fee Alabama license tax on persons engaged in the business of buying and selling futures for speculation or on commission. The 1908 theory that such national grain market operations are not interstate commerce is obsolete today, but, if still valid, would, at most, uphold the imposition of a New York tax on respondent's brokers in New York City, not an Indiana tax on respondent's gross gains from an interstate securities sales business.

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The Decision In Freeman v. Hewit is controlling

The decision in *Freeman v. Hewit* (1946), 329 U. S. 249, in effect decided the question now before the Court. There the Court might have taken the view that the sale of securities was a local transaction between two brokers operating on the New York Stock Exchange and that the ensuing shipment of the securities from Indiana to New York was an inconsequential incident to the completion of a New York sale in New York. That, in effect, was the holding of the Court as respects the Class E sales dealt with in *International Harvester Company v. Department of Treasury* (1944), 332 U. S. 340, and Indiana was permitted to tax such sales occurring within its borders, viz., sales by the seller's Indiana branch to Indiana purchasers completed by the seller's shipment of the goods from points outside Indiana to the Indiana purchasers. Correlatively, it would seem that the state of a seller's residence could impose tax on the seller with respect to such a *local* sale occurring in another state. But the Court did not so hold in *Freeman v. Hewit*. Therefore, it was not the movement of the securities across state lines in *Freeman v. Hewit* which rendered the sale a transaction in interstate commerce, but it was necessarily the negotiation and completion of the sale on a national stock exchange in the stream of interstate commerce, between a seller and a buyer located in different states, which created the interstate commerce and resulting tax immunity, exactly as the court below held in this case.

The decision of the Indiana Supreme Court in this case is founded on the premise that the holding of respondent's stock certificates in the hands of the New York City brokers, without transmission of such certificates across state

lines by respondent from Indiana to New York in completion of prior negotiated sales, did not destroy the interstate character of such sales. That holding is fully supported not only by the decisions hereinabove cited, but by the Acts of Congress in regulating, under the Commerce Clause, the very transactions upon which Indiana seeks to impose the Indiana gross receipts tax.

II

THE INDIANA GROSS RECEIPTS TAX, AS APPLIED TO GROSS GAINS FROM INTERSTATE SALES OF STOCKS, IS NOT IMPOSED ON NET INCOME BUT ON GROSS EARNINGS OR GROSS PROFITS

Gross Earnings Taxes On Interstate Commerce Are Invalid. Net Income Taxes Are Valid.

In numerous decisions this Court has made a distinction between the imposition of gross earnings or receipts taxes on interstate commerce and the imposition of net income taxes on interstate commerce. The Court has invalidated gross earnings and receipts taxes imposed on interstate commerce on the ground that such taxes impose a direct burden and constitute an interference with or regulation of commerce. *Phila. Steamship Co. v. Pennsylvania* (1887), 122 U. S. 326; *Crew Levick Co. v. Commonwealth* (1917), 245 U. S. 292; *Fisher's Blend Station, Inc. v. Tax Commission* (1936), 297 U. S. 650; *Puget Sound Stevedoring Co. v. State Tax Commission* (1937), 302 U. S. 90; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434; *McLeod v. J. E. Dilworth Company* (1944), 322 U. S. 327; *Freeman v. Hewit* (1946), 329 U. S. 249. The Court has sustained state taxes imposed on or measured by

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net income from business carried on in interstate commerce on the ground that such net income taxes are only an indirect and remote burden on interstate commerce and therefore not a regulation of or interference with interstate commerce. *Peck & Co. v. Lowe* (1918), 247 U. S. 165; *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; *Shaffer v. Carter* (1920), 252 U. S. 37; *Atlantic Coast Line v. Daughton* (1923), 262 U. S. 413.

Petitioner Erroneously Asserts That the Indiana Tax is a Net Income Tax

Petitioner asserts, as did the minority opinion in the Court below, that the Indiana gross receipts tax in this instance, as applied to gross profits from sales of securities from margin brokerage accounts under petitioner's Regulation 2805, is a net income tax and therefore not prohibited by the Commerce Clause.

Section 1(n) of the Indiana Gross Income Tax Act provides that the gross income of "brokers and dealers in securities" shall be deemed to mean "gross earnings."

Pursuant to the authority vested in petitioner by Section 29 of the Indiana Act (to promulgate "rules and regulations not inconsistent with this Act"), petitioner has promulgated Regulation 1005 (Petitioner's Brief, p. 5), defining the gross earnings of brokers and dealers in securities taxable under Section 1(n) of the Act as the gross difference between the cost of property and the gross receipts resulting from the sale thereof, without deduction for losses on any transactions. Under similar authority and apparently in construing and applying Section 1(n) of the Act, petitioner has promulgated Regulation 2805 (Petitioner's Brief, p. 4), treating investors operating margin

securities or commodities brokerage accounts as dealers in securities taxable under Section 1(n) of the Act on gross earnings, and defining gross earnings as the gross profits realized where securities are sold for any amount in excess of cost, without any deduction for losses incurred in other sales and without deduction for any expenses incurred in profitable sales.

While the authority for and the validity of petitioner's Regulation 2805 may be questioned (but not at this stage of this case), it is a fact that under Regulation 2805 petitioner has attempted to impose only a gross earnings or gross profits tax (not a total gross receipts tax) on respondent's interstate sales of stocks, but petitioner fallaciously asserts that the tax so imposed is a net income tax and not a gross earnings or receipts tax.

A Net Income Tax Must Allow Reasonable Deduction for Expenses and Losses Incurred In Earning Income

The Court's decisions upholding the imposition of state taxes on net income from interstate commerce in *United States Glue Co. v. Oak Creek; Shaffer v. Carter*, and *Atlantic Coast Line v. Daughton, supra,* dealt with net income taxes imposed on fairly ascertained net income after reasonable allowance of deductions for the cost and expense of earning such net income, including the cost of goods sold, all expenses of sale and losses in unprofitable sales.

The case of *Peck & Co. v. Lowe* involved the Federal Income Tax Act of October 3, 1913, which allowed full deduction for all costs of goods sold, expenses of sale and losses incurred in unprofitable sales, and the court upheld the imposition of such tax on the net income from export sales in foreign commerce. Such a net income tax was held

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to be so indirect and remote as not to fall within the prohibition of Article I, Section 9, Clause 5, of the Constitution that "no tax or duty shall be laid on articles exported from any state." The Court said:

> "* * * At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. * * *" (247 U. S. 175)

The *United States Glue* case involved a similar state net income tax and was decided on the authority of the decision in *Peck & Co. v. Lowe.*

The decision in *Shaffer v. Carter* also involved a state net income tax imposed on the business of a nonresident carried on in interstate commerce in the taxing state, and such tax was sustained on the authority of the decisions in *United States Glue Co. v. Oak Creek* and *Peck & Co. v. Lowe.*

In the *Atlantic Coast Line* case, the net income tax of North Carolina, as imposed on interstate railroads, permitted deduction from gross income for all operating expenses as defined by the Interstate Commerce Commission, but not for expenditures deemed to be capital charges. Again, the Court upheld such a tax imposed on the net income from railroad property used in interstate commerce in the taxing state.

The Court's concept of "net income," in validating state net income taxes imposed on interstate commerce, necessarily assumes that the tax provides for a reasonable allowance for costs and expenses of producing such net income. Such a concept of "net income" could not countenance a

so-called net income computation which would disallow expenses of producing income to the extent of imposing tax on assumed but nonexistent net income. This may be readily demonstrated.

First, it is fundamental accounting law and common sense that the determination of net income can be made only on the basis of a fixed period of time and that, in determining net income during whatever time period is selected, all transactions giving rise to profit, gain or loss and all reasonable costs and expenses incurred in the operation involved must be taken into account. Petitioner's Regulation 2805 fails to take into account, in computing the alleged "net income" which petitioner here seeks to tax, all of the costs and expenses incurred in making sales of stock on the New York Stock Exchange and all losses incurred in the making of such sales.

Consider, next, the concept of "income" taxable under the Sixteenth Amendment, empowering Congress "to lay and collect taxes on incomes." Significantly, the Amendment does not limit the federal tax to "net income," and the Court has therefore held that all deductions and exemptions allowed under the federal income tax are a matter of grace and may be entirely withdrawn by Congress and that the federal tax may thereby be converted into a tax on gross income. *Stanton v. Baltic Mining Co.* (1916), 240 U. S. 103; *Tyee Realty Co. v. Anderson* (1916), 240 U. S. 115; *Helvering v. Independent Life Ins. Co.* (1934), 292 U. S. 371. See discussion in Mertens, Law of Federal Income Taxation, Vol. 1, Ch. 5, Sec. 5.10.

The Court said in its decision in the *Independent Life Insurance* case:

> "Unquestionably Congress has power to condition, limit, or deny deductions from gross income

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in order to arrive at the net that it chooses to tax." (292 U. S. 381)

In the light of those decisions on the federal income tax, construing the word "income" as permissibly meaning "gross income," the Court's concept of "net income" from interstate commerce which may be taxed by the states can only refer to a reasonable ascertainment of actually realized and retainable gain or profit from interstate business or activity after the deduction of expenses and losses, which is exactly what the Court said it meant by "net income" in its opinion in the *United States Glue* case, viz.:

> "* * * The distinction between a direct and an indirect burden by way of tax or duty was developed [in the decision in Peck & Co. v. Lowe], and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.
>
> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax

upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. * * *" (247 U. S. 328)

The Indiana Tax Is Not a Tax On Net Income, But on Gross Earnings and Gross Profits

Having thus ascertained the meaning and scope of "net income" from interstate commerce which the states may tax, it is obvious that the Indiana tax, as applied by petitioner's Regulation 2805, is not a tax on net income, because it allows no deduction whatever for the expenses of selling securities and does not permit the deduction of losses in unprofitable sales. Liability for tax thus imposed could be incurred where there was no net income, but an actual loss for the taxable period, either because of the nondeductibility of expenses of sale or because of the nondeductibility of losses. Likewise, tax would be imposed on individual transactions in which a net loss was sustained. This may be illustrated by reference to but one actual sale made by respondent, viz., 100 shares of Johns-Manville Corporation sold November 22, 1944, at a gross profit of $7.30 (R., p. 9). The expense of making that sale, for brokerage commissions, transfer taxes, etc., certainly amounted to more than $7.30.

The Commercial & Financial Chronicle, Vol. 160, p. 2306, quotes Johns-Manville stock at 97¼, both high and low, on November 22, 1944. A sale of 100 shares produced $9,725.00. The then brokerage charge on such sale would have been $35.00, 35c per share on shares selling for more than $90 per share. The now prevailing commission would be $44.73 on such sale (1/10 of 1% of sales price plus

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$35.00). See Commission Rates of the New York Stock Exchange, November, 1953 Edition, published by Association of Stock Exchange Firms. On that transaction respondent suffered a net loss of $27.70.

As a Tax on Business Income, the Tax Is Imposed on Gross Income

Petitioner's only authority for the issuance of Regulation 2805 is the assumption that the operation of a margin account is a business equivalent to the business of "brokers, dealers in securities" taxable on "gross earnings" under Section 1(n) of the Indiana Act. But the petitioner's Regulation 2805 does not attempt to tax the net income of such brokerage business. Petitioner attempts to impose an income tax on the highest possible gross income, the gross profits, if the tax may be considered an income tax at all.

In *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U.S. 434, the Court invalidated the imposition of the Washington gross receipts tax on the gross earnings of a Washington fruit brokerage firm from the negotiation of interstate sales of apples and pears. The tax was imposed on gross earnings from services, or gross income, without deduction for expenses of operation. In the instant case the tax is imposed on gross profits, which is the same as gross earnings or gross income, without deduction for expenses of sales. The Court's condemnation of the Washington tax necessarily means that the tax was not a net income tax. If the Washington tax was not a net income tax, neither is the Indiana tax a net income tax.

The Instant Indiana Tax Is a Selected Transaction Tax—An Excise On the Receipt of Gross Profits

As imposed by petitioner, the tax is not in any true sense an income tax, but a selected transactions tax, an excise tax on the receipt of gross profits from selected sales of securities from margin accounts. Under no decision of this Court or of any other court, under no acceptable accounting theory or practice and under no valid rule or regulation is the tax which petitioner here seeks to levy an income tax, and certainly not a net income tax.

III

THE IMPOSITION OF THE INDIANA GROSS RECEIPTS TAX ON THE GROSS GAINS FROM SALES OF SECURITIES FROM MARGIN BROKERAGE ACCOUNTS ON THE NEW YORK STOCK EXCHANGE IS PROHIBITED BY THE COMMERCE CLAUSE

The Indiana Gross Profits Tax is Inherently Offensive to the Commerce Clause

The Indiana gross income tax is just "what it purports to be—a tax upon gross receipts from commerce," as this Court expressly held in its first decision on the Indiana tax in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U.S. 307. The basis of the tax is utterly without limit: the same tax may be imposed by any state which, upon any ground, may assert that receipts are derived even partially from sources within the state. For that reason it is the kind of tax against which interstate commerce must be given thorough protection. That has been the treatment given to the Indiana tax in this Court.

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The Indiana Tax, Imposed Without Apportionment and as a Potential Multiple Tax Burden, Violates the Commerce Clause

In the *Adams* case the Court held that Indiana could not impose its tax on the sales receipts of an Indiana seller from outgoing interstate sales of goods to buyers in other states. Analysis of the Act and consideration of the circumstances under which it was enacted, led the Court to the following conclusions:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of nonresidents from sources within the State. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales such as the State would be competent to demand from domestic or foreign corporations for the privilege conferred.* It is not an excise upon the privilege of producing or manufacturing within the State, measured by volume of production or the amount of sales.* It is not a tax in lieu of ad valorem taxes upon property, which would be inoffensive to the commerce clause,* since the appellant pays local and state taxes upon its property within the State and it appears that these, as respects appellant and others similarly situated, have not been reduced. The Act, moreover, is silent as to the tax being in lieu of property taxes. The opinion of the Supreme Court suggests that the statute was adopted as part of a scheme for the reduction of local property taxes and the substitution of a gross income tax but, as appellant points out, provision for reduction of property taxes was made by legislation passed in 1932.*" (304 U. S. 310-11)

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* Footnotes omitted.

In holding that an unapportioned gross receipts tax could not be imposed by the seller's state on receipts from interstate sales, the Court further said:

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales.
>
> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.* We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution.* The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce.*" (304 U. S. 311-12)

The condemnation of a gross receipts or gross earnings tax for lack of a proper apportionment and because of the resulting potential multiple tax burdens was repeated by the Court again in *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, invalidating the attempt of the State of Washington to impose its gross receipts

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* Footnotes omitted.

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tax on the gross earnings of a fruit broker from negotiating sales of fruit in interstate commerce.

The Lack of Apportionment Has Never Been Cured

The first defect found in the Indiana gross income tax in the *Adams* case, viz., that the tax was imposed without apportionment on gross receipts from an interstate sale, has never been cured. The Act provides for no apportionment, and petitioner has made no effort by regulation or otherwise to adopt or apply a rule of apportionment. Respondent's entire business carried on in interstate commerce is the total source of respondent's gross profits from sales. If the local delivery of the stock certificates in New York City were singled out and held to be intrastate, this might permit New York to impose tax on such local transaction, but it does not empower Indiana to impose an unapportioned gross profits tax on the entire gross profits which are derived from respondent's total interstate business and not merely from the local delivery in New York City.

The Instant Indiana Tax Imposes a Potential Multiple Burden On Commerce

The further defect found in the Indiana tax in the *Adams* case, viz., that it resulted in the imposition of potential multiple tax burdens, has not been cured and could not be cured. A potential multiple tax burden exists in this case probably more than in any similar case that has come before the Court. The operation of a margin stock brokerage account, involving an established and continuous use and investment of money, the making of purchases and sales and the management of the ac-

count, sufficiently constitutes the doing of business as to give the margin account a business situs at the place of operation, in this instance New York City. *New Orleans v. Stempel* (1899), 175 U. S. 309; *Bristol v. Washington County* (1900), 177 U. S. 133; *Metropolitan Life Insurance Co. v. New Orleans* (1907), 205 U. S. 395; *Wheeling Steel Corp. v. Fox* (1936), 298 U. S. 193; *First Bank Stock Corp. v. Minnesota* (1937), 301 U. S. 234. Even petitioner concedes that respondent is engaged in carrying on a brokerage *business*, by petitioner's Regulation 2805, taxing the gross profits from margin stock sales under Section 1(n) of the Indiana Act applicable to "brokers, dealers in securities." Under Indiana law, such business has a business situs in New York. *Miami Coal Co. v. Fox* (1931), 203 Ind. 99, 176 N. E. 11.

The state where such business situs exists has an adequate due process basis for the imposition of the same gross profits tax which petitioner seeks to impose upon respondent. Unless restrained by the prohibition of the Commerce Clause, both Indiana and New York, and even New York City, may impose a gross profits tax on respondent's gross profits from the same selected sales of stocks held in respondent's margin accounts. The Court's decision in *Norton Co. v. Department of Revenue* (1951), 340 U. S. 534, would leave little doubt as to the potential imposition of such a tax in New York state.

The Decision In Freeman v. Hewit Utterly Condemned the Application of the Indiana Tax to Interstate Sales of Securities

The lack of apportionment and the potential multiple tax burden defects not having been cured, the Court later ignored those defects in holding the Indiana tax invalid as simply a gross receipts tax on interstate commerce

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and therefore an invalid burden on and regulation of interstate commerce. This development came with the decision in *Freeman v. Hewit* (1946), 329 U. S. 249, invalidating the tax as applied to gross receipts from the sale of securities on the New York Stock Exchange by an Indiana resident, using the services of an Indiana broker and his correspondent New York brokers in initiating and negotiating such sales, and transmitting the securities sold from Indiana to New York after the sales had been negotiated.

Interstate Sales of Stock From Margin Accounts Are Exempt From the Indiana Tax Under Freeman v. Hewit

The majority opinion below relied specifically on the decision in *Freeman v. Hewit* in denying the validity of the tax imposition in the instant case. The only difference in the respective factual situations in *Freeman v. Hewit* and the case at bar is that the stock certificates were shipped from Indiana to New York by the taxpayer in *Freeman v. Hewit*, while here the stock certificates were held by the brokers in New York City. The stock certificates are the mere evidence of ownership. Their location, even their existence, is generally inconsequential in determining the validity of state tax impositions. *Greenough v. Tax Assessors* (1947), 331 U. S. 486. The Court below rejected petitioner's argument, also made here, that the absence of the interstate transmission of the stock certificates removed respondent's transactions from interstate commerce. The Court said:

> "We cannot agree. Importance cannot attach to whether a piece of paper goes over state boundaries. Importance must attach to whether the *transaction itself* was a part of interstate commerce.

> "As the Supreme Court of the United States pointed out in the case of Freeman v. Hewit, supra, the vital question in each case is whether the *sale itself* was in the field of interstate commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference." (116 N. E. 2d 104, R., p. 28)

The decisions cited and discussed under Point I of this Argument fully support the reasoning of the Court below, particularly *Freeman v. Hewit.*

After citing numerous illustrations of permissible taxes bearing on interstate commerce, such as manufacturers' excise taxes, corporate franchise taxes, *net* income taxes and property taxes, the Court in its decision in *Freeman v. Hewit* differentiated those taxes permitted to the states from a tax like the Indiana tax which was held to be a direct and invalid tax on gross receipts from interstate commerce. The Court said:

> "These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." (329 U. S. 256)

The Indiana Gross Profits or Gross Business Income Tax Falls Under the Condemnation of Gwin, White & Prince v. Henneford

It is significant, we submit, that the tax invalidated in *Gwin, White & Prince, Inc. v. Henneford, supra,* was a *gross earnings tax* and presented for all practical purposes the identical tax now before the Court. The taxpayer in that case was a brokerage firm which negotiated the sale of fruit in interstate commerce, collected the gross proceeds of sale, deducted and retained its commission charges, and remitted the net proceeds of sale to its principals. The gross earnings of the broker represented, in effect, the difference between the gross proceeds of sale and the net proceeds remitted by the broker to its principals, just as in the case at bar the respondent's gross earnings or profits are the difference between the gross proceeds of sale and the cost of stocks sold. Only gross *earnings* were taxed in *Gwin, White & Prince,* just as only gross *profits* were taxed in the instant case. Gross *receipts* from sales were taxed in neither case. Taking into account only the practical considerations involved in the two cases, we submit that, if a gross earnings tax should be sustained in this case, *Gwin, White & Prince* would have been wrongly decided. On the contrary, *Gwin, White & Prince* was correctly decided: a gross earnings or gross profits tax imposed on receipts from interstate sales is equally as burdensome and invalid as a tax imposed on the gross receipts from interstate commerce.

In the Absence of Congressional Consent, An Indiana Gross Earnings Tax Cannot Be Imposed On Interstate Commerce

The decision in the *South-Eastern Underwriters* case generated the attempt of the insurance companies in *Prudential Insurance Co. v. Benjamin* (1946), 338 U. S. 408, to invalidate the traditional state gross premium receipts taxes long imposed on insurance companies prior to the *South-Eastern Underwriters* decision. Only the enactment by Congress of the McCarran Act, 15 U. S. C. 1011-15, pursuant to its power to regulate commerce, consenting to the continued imposition of the state gross premium taxes, saved those taxes from the interdict of the Commerce Clause. There is, of course, no Congressional consent to the imposition of the Indiana tax on respondent's gross profits from interstate sales.

Respondent's Stocks Were Sold in the Stream of Interstate Commerce and Therefore Are Exempt from the Indiana Tax

Under the decisions in *Gross Income Tax Division v. Quick* (1938), 226 Ind. 329, 78 N. E. 2d 871, and *Gross Income Tax Division v. Strauss* (1938), 226 Ind. 338, cert. den. in both cases, 335 U. S. 860, respondent's margin account stocks were placed in the stream of commerce upon being offered for sale on the New York Stock Exchange, and the ensuing sales of such stocks were sales in interstate commerce exempt from the Indiana gross income tax.

Unless the Court should deny that respondent's sales of stocks on the New York Stock Exchange constituted sales in interstate commerce, or unless the Court should hold that the Indiana gross profits tax is in effect a net income

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tax, it follows ineluctably that the tax in the instant case is an invalid burden on interstate commerce.

State Taxes Discriminating Against Interstate Commerce Are Per Se Invalid

Any state tax which discriminates against interstate commerce is *per se* a prohibited burden on commerce, as all of the opinions rendered by the Justices of this Court, both majority and dissenting opinions, hold, to the extent even that, in finally reconciling his divergent views with the Court's majority views, Mr. Justice Rutledge, in his concurring opinion in *Freeman v. Hewit,* classified a potential multiple tax as a discriminatory tax, saying: "The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax." (329 U. S. 277.)

The Indiana Tax Discriminates Against Respondent's Interstate Business In Favor of Public Terminal Grain Handlers

But in the instant case we have real and actual discrimination against respondent and in favor of other taxpayers engaged in sales transactions not essentially different from respondent's sales of stock from margin accounts on the New York Stock Exchange. Petitioner sets out in Appendix "A" of its brief, page 28, the provisions of Section 3(h) of the Indiana Gross Income Tax Act, which imposes tax on the receipts of public terminal grain handlers from the purchase and sale of whole grain and soybeans, wherein tax at the same 1% rate is imposed on "the gross earnings, computed on an annual basis, derived from such sales

of grain and soybeans," and gross earnings are defined to mean "the gross receipts from sales of such grain and soybeans less the cost of grain and soybeans sold during such period." Under those provisions of the Indiana Act public terminal grain handlers, whether engaged in interstate or intrastate commerce, are taxed on gross earnings on an *annual* basis, not on the basis of gains from selected transactions. Such taxpayers are permitted to deduct the costs of all grain and soybeans sold from the gross proceeds of sale thereof, whereas respondent and all other sellers of securities held in marginal brokerage accounts are subjected to a gross profits tax on each individual gross gain transaction, without any deduction or benefit for losses on unprofitable transactions.

While this is a discrimination against all sellers engaged in marginal brokerage transactions, both interstate and intrastate, it is nevertheless in fact a discrimination against respondent in the imposition of tax liability on respondent's profits from interstate sales. Such equality of treatment could not purge the discrimination. In *Freeman v. Hewit,* the Court said:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause." (329 U. S. 254)

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The Indiana Tax Discriminates Against Respondent's Interstate Business Having An Out-State Business Situs In Favor of All Other Businesses Having An Out-State Business Situs

Further discrimination in the imposition of the tax on respondent's gross earnings from interstate sales of stocks arises by virtue of the statutory and regulatory provisions, set forth at pages 2-3, *supra*, exempting from tax "gross receipts derived from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana." (Section 1(m) of the Indiana Act.) Petitioner's Regulation 4100, Rule 4, likewise exempts the receipts derived from the operation of a "business, the legal situs and location of which is in a state other than Indiana."

Under such business situs exemption, it could not be denied that if respondent set up his own office in New York City and there carried on the same margin stock brokerage business which is carried on for respondent by respondent's brokers in New York City, respondent's receipts from the operation of such business having a business situs outside Indiana would be exempt from tax. Petitioner's basis for taxing respondent on a so-called gross earnings basis is that respondent is engaged in business as a broker or a dealer in securities taxable under Section 1(n) of the Act on a gross earnings basis. (See discussion at pp. 19-20 and 25, *supra*.) Under Indiana law, respondent's business has a business situs in New York. *Miami Coal Co. v. Fox* (1931), 203 Ind. 99, 176 N. E. 11. Again, the fact that all margin brokerage account operators, both interstate and intrastate, are given the same tax treatment under petitioner's Regulation 2805, does not

rectify the discrimination against the interstate business conducted by respondent in the operation of his New York margin brokerage accounts. We submit, therefore, that the business situs exemption, totally exempting from tax the receipts from the operation of a business conducted outside Indiana, operates to impose a discriminatory and invalid burden on commerce if the tax against respondent should be sustained in this case.

Further, under the business situs exemption provided in the Act, Indiana sellers of tangible personal property in the operation of a business having a business situs outside Indiana, including the operation of a farm outside Indiana (as provided in petitioner's Regulation 4100, Rule 4), would be totally exempt from liability for the Indiana tax; while respondent, who is deemed to be engaged in the operation of a brokerage business or the business of dealing in securities, and who certainly has established a business situs in New York City in respect to the operation of his margin stock brokerage accounts, is subjected to tax on his gross profits from interstate sales of stocks made in the operation of such brokerage business. This further imposition of a discriminatory tax on respondent invalidates the tax.

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CONCLUSION

Only one conclusion in the determination of this case is consistent with the prior decisions of this Court cited and discussed in the foregoing Argument, viz.: That respondent's sales on the New York Stock Exchange of stock from margin brokerage accounts maintained in New York City are interstate sales; that the Indiana gross income tax, as imposed under petitioner's Regulation 2805, is not a net income tax, but is a gross profits or earnings tax; and that the imposition of such tax against respondent is a direct and discriminatory burden on interstate commerce and for that reason is invalid.

It may appropriately be added that to sustain the tax in this case would potentially open the door to the imposition of state gross receipts, earnings and profits taxes on the vast volume of margin account transactions on all of the securities and commodities exchanges operating in the United States, including the great volume of hedging and margin dealings in grain and commodity futures legitimately carried on for the protection of the great industries of the country manufacturing food and other products and for the benefit as well of the general public. To sustain the instant tax would put a tremendous volume of the interstate commerce of the country in jeopardy of the imposition of state gross receipts, earnings and profits taxes to which such commerce has not heretofore been subjected. The widespread imposition of state net income taxes on such commerce is enough.

The petitioner now asks the Court to sustain an isolated transactions tax on gross earnings from interstate commerce, when the Court has heretofore validated only legiti-

mate net income taxes thereon. Sound legal and economic reasons negative the imposition of such additional gross income taxes. If the State of Indiana desires to tax interstate commerce it should adopt a true net income tax.

Respectfully submitted,

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No. 55. INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, *v.* NEBEKER. Certiorari, 348 U. S. 808, to the Supreme Court of Indiana. Argued February 1, 1955. Decided February 7, 1955. *Per Curiam:* Affirmed on the authority of *Freeman* v. *Hewit*, 329 U. S. 249. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Lloyd C. Hutchinson*, Deputy Attorney General of Indiana, argued the cause for petitioner. With him on the brief were *Edwin K. Steers*, Attorney General, and *Carl M. Franceschini*, Deputy Attorney General. *Raymond O. Evans* argued the cause and filed a brief for respondent. Reported below: 233 Ind. 58, 116 N. E. 2d 104.